Supreme Court, U.S.
FILED

931686 APR 25 1994

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD B. NELLIS, *et al.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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89 pp

QUESTIONS PRESENTED

1. Whether the implied federal duty of fair representation preempts a union member's state law claims that his union breached contractual obligations owed directly to union members?

2. Whether the implied federal duty of fair representation, which is intended to protect union minorities from abuse by the union majority, permits a union to repudiate its contractual commitments to its members simply because the majority in the union so desires?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Richard B. Nellis, Andrew R. Hawkins, Stuart Hughes, Edward J. Breen, Jr., Raymond T. Burke, Edward L. Fugate, Fred K. Testa, William T. Gaffney, and Vincent G. Brocklebank, who are suing on behalf of themselves and a class of 2,400 former pilots for Eastern Airlines. Respondent is the Air Line Pilots Association, International.

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Petitioners,

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AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 15 F.3d 50 (App. 1a-5a). The opinions of the United States District Court for the Eastern District of Virginia are reported at 805 F. Supp. 355 and 815 F. Supp. 1522 (App. 49a-61a & 6a-48a).

JURISDICTION

The court of appeals entered judgment on January 24, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Art. VI:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . .

STATEMENT OF THE CASE

Petitioners are nine individuals representing themselves and a certified class of 2400 similarly situated former Eastern Airlines pilots whose union, respondent Air Line Pilots Association ("ALPA"), breached its promises to arrange for them to be hired, with recognition of their years of seniority at Eastern, by air carriers that acquired Eastern's assets during and following the strike against Eastern in 1989. ALPA not only failed to take any meaningful affirmative steps to fulfill these promises, it actively obstructed their fulfillment by persuading the carriers acquiring Eastern's assets not to offer jobs with seniority to Eastern pilots.

The courts below decided that petitioners have no remedy against their union for this conduct. The district court dismissed petitioners' state law claims on preemption grounds, holding that the exclusive remedy for breach of promise by a union is the federal duty of fair representation (App. 49a-61a). The court then granted summary judgment to ALPA on the duty of fair representation claim, holding that a union's breach of promise does not violate that duty if the breach is favored by a majority of the union membership (App. 6a-48a). The court of appeals

adopted these rulings as the law of the Fourth Circuit (App. 1a-5a).

(i) Factual Background

On March 4, 1989, petitioners and the class of pilots they represent commenced a strike against Eastern Airlines (App. 6a-7a). Within days thereafter, Eastern filed a petition under Chapter 11 of the Bankruptcy Code (App. 7a).

In order to obtain support from the Eastern pilots for the strike, ALPA made two types of promises. ALPA first promised that it would apply its existing "Merger Policy" to any breakup of Eastern resulting from the strike in a manner that would ensure that Eastern pilots would transfer with seniority to carriers that acquired Eastern assets as a result of the strike (App. 13a). Independent of its Merger Policy, ALPA also promised that it would "make every effort to be sure that Eastern pilots go with [the transferred assets]," and "mandate[d] that Eastern pilots *would* be transferred with their seniority intact to any other ALPA carrier that may acquire Eastern aircraft or routes" (App. 13a). These promises were set forth in resolutions of the Executive Board, one of the highest governing bodies of ALPA, and in written and video tape communications sent into the homes of every striking Eastern pilot (App. 12a-13a).

The Merger Policy establishes an internal union procedure to ensure the transfer of pilots, with seniority, between airlines in connection with mergers and other types of asset dispositions. At the time of the Eastern strike, the Policy provided that ALPA would "take all steps" to ensure the right of pilots at a "donor" airline such as Eastern to obtain jobs,

with seniority, as pilots at an airline to which assets are transferred (App. 10a). Once the acquiring carrier committed to hire the donor carrier's pilots, the Policy provided a procedure for determining the number of pilots that would transfer and the manner in which they would be slotted into the acquiring carrier's seniority list (App. 10a).

Notwithstanding ALPA's initial promises when it was attempting to marshall support for the strike, ALPA and the Master Executive Councils ("MECs")[1] for the acquiring airlines did not support lateral transfer when ALPA carriers began to acquire Eastern's assets. Instead, in direct contacts with the acquiring carriers who would otherwise have been willing to hire Eastern pilots with seniority, they objected to lateral transfer (App. 13a-16a). Despite Pan Am management's express willingness to hire Eastern pilots with seniority in connection with Pan Am's 1989 lease of 14 aircraft from Eastern, "opposition within ALPA, specifically from the Pan Am MEC, eventually caused Pan Am to hire pilots from elsewhere" (App. 14a). There was similar opposition from within ALPA to the transfer of Eastern pilots to Midway in connection with its 1989 acquisition of 10 Eastern planes (App. 14a). Likewise, in negotiations with USAir concerning

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[1] Unlike most labor organizations, ALPA is a unitary labor organization, with a single Constitution governing all subordinate bodies. It has no local unions. Instead, ALPA has a Master Executive Council at each airline employing ALPA pilots, composed of elected representatives from that airline's pilot group (App. 7a). The MECs have no existence independent from ALPA, and under the terms of ALPA's Constitution, ALPA—not the MECs—is responsible for representing the pilots at each airline. The MECs are thus bound by ALPA's policies and ALPA is bound by the MECs'actions.

its 1989 offer to purchase 15 Eastern jets, the USAir MEC objected to the express condition in USAir's written offer that Eastern pilots be hired with seniority (App. 14a-15a). Finally, the Delta MEC reached a private agreement with management to the effect that the Policy did not apply to Delta's 1991 purchase of 10 Eastern aircraft (App. 15a).

Following the strike, ALPA interpreted and amended the Merger Policy so as to dilute or eliminate the requirement that it "take all steps" to secure lateral transfer (App. 10a-12a). ALPA then concluded that it had complied with its amended Merger Policy with respect to the Pan Am and Midway transactions in 1989 and "never formally resolved the issue of whether ALPA's . . . Policy obligations with respect to [the Delta transaction in 1991] were completely satisfied" (App. 17a-18a). ALPA never addressed whether the interference by the MECs at the acquiring carriers with their managements' willingness to hire Eastern pilots with seniority was in compliance with the Policy and promises previously made to Eastern pilots.

The allegations in the complaint, along with the fair inferences to be drawn from the record on ALPA's motion for summary judgment, were that: (1) ALPA promised to obtain lateral transfer jobs for Eastern pilots; and (2) ALPA breached that promise by actively opposing lateral transfer. As the district court concluded:

> ALPA's national leadership reached a determination in 1989 that obtaining jobs with lateral seniority at the acquiring carriers for the Eastern pilots would be politically unpopular with the majority of the ALPA membership.

> As a result, according to plaintiffs, ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots under the Fragmentation Policy. . . . In the Court's view, a reasonable jury could draw inferences from the factual record to accept plaintiffs' theory (App. 35a-36a).

(ii) Proceedings Below

The complaint sought relief under state law for breach of contract, intentional interference with contractual relations, and promissory estoppel, and under federal law for breach of ALPA's duty of fair representation. The district court dismissed petitioners' state claims on the ground that they are preempted by the federal duty of fair representation. As the district court put it, the question to be decided was whether

> state common law of contract prohibited ALPA from making explicit enforceable promises to its members and then reneging on those promises, even if such conduct was not sufficiently 'arbitrary, discriminatory, or in bad faith' to satisfy the standard for breach of the duty of fair representation (App. 55a).

After acknowledging that this Court's decisions in *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990) and *I.B.E.W. v. Hechler*, 481 U.S. 851 (1987) supported the applicability of state contract law to distinct promises made by a union to its members, the district court nevertheless held petitioners' claims preempted on the theory that *Rawson* and *Hechler* do

not apply to promises that relate to collective bargaining (App. 56a-59a).

After completion of discovery, ALPA moved for summary judgment on the federal duty of fair representation claim. The district court granted the motion, holding that ALPA's breach of promise was not "arbitrary, discriminatory or [in] bad faith" within the meaning of the test set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967). The court held first that it was not "arbitrary" for ALPA to accede to the wishes of the acquiring airlines' pilots even if to do so violated a promise to the minority Eastern pilots, because "[a] union leadership's decision to follow the wishes of the majority of its members is not merely rational, but is the very essence of union democracy" (App. 22a) (citing the Seventh Circuit's decision in *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524, 1533 (1992)). The district court likewise ruled that ALPA's conduct was not "in bad faith" because there was no evidence that ALPA intended renege on its promises when they were made. The court acknowledged that "plaintiffs may justifiably be upset that ALPA did not hold firm to its initial enthusiasm for seniority integration," but it concluded that "in the face of the majority of its members who had reason to oppose the policy, plaintiffs cannot argue that ALPA's initial promulgation of the policy, or ALPA's early statements in support of the policy were intended to be 'intentionally misleading' " (App. 23a-24a).

Finally, the district court found no evidence of discriminatory conduct by ALPA. Although purporting to apply a separate test for "discrimination" from that it applied to "arbitrariness," the court again deferred to ALPA's "not patently unreasonable" de-

termination that it had done all that was required by the Policy and its strike promises (App. 38a-41a). This decision, like the decision on the "arbitrary" and "bad faith" prongs of the duty of fair representation test, was based on the lower court's view of majority rule in internal union affairs. The court found evidence that the union majority had changed ALPA's commitment to the minority Eastern pilots after the latter had relied upon it:

> Until it became obvious which airline faced fragmentation of its assets, pilots at all the carriers stood an equal chance of benefitting under the Fragmentation Policy. ***Only when it became evident that it was the Eastern pilots who were likely to benefit from the implementation of the policy, to the relative disadvantage of the pilots at the acquiring airlines, did the self interest of the acquiring airlines' pilots cause them to oppose vigorous implementation of the Policy*** (App. 25a) (emphasis added).

The court nevertheless approved this conduct on the ground that "minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority" (App. 41a-42a). The Court below thus joins the Seventh Circuit in *Rakestraw* in articulating a test of almost total deference to union majorities.

The Court of Appeals issued a *per curiam* opinion adopting the two opinions of the district court as the law in the Fourth Circuit (App. 5a).

REASONS FOR GRANTING THE WRIT

The Decision Below Preempting State Contract Claims Conflicts With Decisions Of This Court And Raises Important Questions Of Law Regarding The Proper Scope Of Labor Law Preemption.

1. The holding below that the duty of fair representation *itself* preempts state contract law (App. 55a), conflicts with this Court's established construction of the Supremacy Clause. The Court has recently reaffirmed that it is "reluctant to infer pre-emption" in the absence of an express statutory provision, and that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S.Ct. 1190, 1194 (1993) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). "The question whether a certain state action is preempted . . . is one of Congressional intent," *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 207-08 (1985); "[t]he purpose of Congress is the ultimate touchstone." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. at 747, citing *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

This Court has never held that the duty of fair representation is itself a source for preemption of state law. Neither the duty of fair representation nor any cause of action for its breach is contained in any law enacted by Congress. On the contrary, the duty was implied by the Court to protect union members from abuse of the exclusive collective bargaining power conferred on unions. *Vaca v. Sipes*, 386 U.S. at 181; *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 204 (1944). Obviously, Congress cannot have in-

tended a cause of action created by the courts to preempt state law; preemption in these circumstances is unprecedented and conflicts with the Supremacy Clause itself.[2]

2. Even if the duty of fair representation has some limited preemptive force, this Court's prior decisions preclude it from preempting petitioners' contract claims here. In *United Steelworkers of America, AFL-CIO v. Rawson*, 495 U.S. 362 (1990), this Court rejected a union's argument that a union member's contract claim was preempted by the duty of fair representation observing that "we have never held . . . that, as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to its employees by contract." 495 U.S. at 373. Likewise, in permitting a union member to proceed with a contract claim for failure to maintain a safe

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[2] *See Rawson*, 495 U.S. at 382 (Kennedy J., dissenting) (citations omitted):

> Although we have inferred that Congress intended to impose a duty of fair representation in § 9(a), I see no justification for the further conclusion that Congress desired to grant unions an immunity from all state tort law. Nothing about a union's status as the exclusive representative of a bargaining unit creates a need to exempt it from general duties to exercise due care to avoid injuring others. At least to some extent, therefore, I would conclude that Congress "by silence indicate[d] a purpose to let state regulation be imposed."

See also, Worm v. American Cyanamid Co., 970 F.2d 1301, 1308 (4th Cir. 1992)(the lack of an explicit federal cause of action for false labeling under the Federal Insecticide, Fungicide and Rodenticide Act supported the court's finding that state law claims were not preempted by the Act); *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101, 1108 (4th Cir. 1989)(*en banc*).

workplace in *I.B.E.W. v. Hechler*, 481 U.S. 851, 860 (1987), this Court recognized that a union can "accept[ ] a duty of care through a contractual arrangement" that it would not otherwise have under the duty of fair representation. The Court stated that breach of such a duty can be the subject of a state law "action for breach of contract or a tort . . . for the injuries suffered as a result of the contractual breach." *Id.*[3]

The courts below held that *Rawson* and *Hechler* are not controlling here, reasoning that a union cannot by contract assume "additional duties . . . [that] define bargaining positions . . . or parties with whom the union must negotiate . . . [because] duties of this nature would conflict with, rather than supplement, the duty of fair representation" (App. 58a-59a). This holding conflicts in fundamental principle with decisions of this Court that have rejected the argument that decisions respecting collective bargaining are immu-

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[3] Numerous decisions have permitted union members to pursue contract claims against their unions under section 301 of the Labor Management Relations Act ("LMRA") in circumstances governed by that statute, *Wooddell v. I.B.E.W.*, 112 S.Ct. 494, 498-501 (1991); *Hechler v. I.B.E.W.*, 834 F.2d 942, 947-49 (11th Cir. 1987); *Moore v. Local 569, I.B.E.W.*, 989 F.2d 1534 (9th Cir, 1993); *Doby v. Safeway*, 523 F. Supp. 1162 (E.D.Va. 1981); *Legutko v. Local 816, Int'l Bhd. of Teamsters*, 606 F. Supp. 352 (E.D.N.Y. 1985), *aff'd*, 853 F.2d 1046 (2d Cir. 1988), and under state law where no federal contract jurisdiction exists under section 301. *See I.A.M. v. Gonzales*, 356 U.S. 617, 618-19 (1958); *Hogan v. Bhd. of Ry., Airline and Steamship Clerks*, 629 F. Supp. 1166, 1172 n.11 (W.D. Va. 1986), *aff'd*, 817 F.2d 248 (4th Cir. 1987); *Bender v. Highway Truck Drivers & Helpers, Local 107*, 598 F. Supp. 178, 183 (E.D.Pa. 1984), *aff'd*, 770 F.2d 1066 (3d Cir. 1985); *Brown v. Sombrotto*, 523 F. Supp. 127, 133 (S.D.N.Y. 1981).

nized by the preemption doctrine from challenge under state law. The Court has refused to preempt state laws that require substantive terms in a collective bargaining agreement, stating that federal labor law "is concerned primarily with establishing an equitable *process* for determining terms and conditions of employment, and not with particular substantive terms of the bargain." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752-53 (1985) (emphasis added). The Court has also refused to preempt state law fraud and contract claims by replacement hires against an employer for refusal to honor strike promises that replacements would become permanent employees. *Belknap v. Hale*, 463 U.S. 491 (1983). And the Court has repeatedly rejected arguments for special treatment of collective bargaining under the duty of fair representation. *Vaca v. Sipes*, 386 U.S. at 181 (duty of fair representation suits often involve judicial review "of the substantive positions taken and the policies pursued by a union in its negotiation of a collective bargaining agreement"); *ALPA v. O'Neill*, 499 U.S. 65, 73-77 (1991) (rejecting ALPA's contention that collective bargaining is a special category of union conduct immunized from review under the duty of fair representation). The Court has thus rejected the fundamental basis for the lower court preemption of petitioners' breach of promise claims.

3. Finally, any preemptive force attributed to the duty of fair representation must derive solely from the overlap of the duty with some substantive federal labor statute. *See Vaca v. Sipes*, (breach of duty of fair representation may constitute an unfair labor practice); *Amalgamated Association of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S.

274, 289 (1971).[4] Neither the lower court nor ALPA has ever identified any provision of the federal labor statutes that prohibits, protects or leaves unregulated the voluntary obligation assumed by ALPA which petitioners seek to enforce under state law in this case. *San Diego Building Trade Council v. Garmon*, 359 U.S. 236, 244 (1989); *Building & Construction Trades Council v. Associated Builders & Contractors*, 113 S.Ct. 1190, 1194-95 (1993); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 750 (1985).

ALPA's promise to ensure lateral transfer for Eastern pilots is one of a number of acceptable courses of action for the union to pursue when assets are transferred between airlines, and the union does not contend otherwise. Petitioners' claim is simply that, having settled on this completely valid course in advance and asked the Eastern pilots to strike in reliance upon the promise that it would pursue this action, the union may be held liable in damages when

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[4] Petitioners' claims are plainly not preempted because they infringe on the primary jurisdiction of any administrative agency charged by Congress with administering the RLA, as the lower court acknowledged (App. 53a n. 2), *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972); *see also Lockridge*, 403 U.S. at 289 (claim would involve the primary jurisdiction of the National Labor Relations Board), or because they seek to enforce or otherwise depend on the interpretation of a collective bargaining agreement. *Andrews*, *supra* (such suits preempted by section 204 of the RLA); *see also*, *Allis Chalmers v. Lueck*, 471 U.S. 202 (1985)(suits requiring interpretation of collective bargaining agreement preempted by section 301 of the LMRA); *Hechler*, *supra* (same); *Rawson*, *supra* (same).

it reneges afterwards and actively opposes the outcome it previously promised to support. In such circumstances, there is no basis recognized by this Court for intruding on "the interest of the State in providing a remedy to its citizens for breach of contract." *Belknap, Inc. v. Hale*, 463 U.S. at 512.

The Decision Below That The Duty Of Fair Representation Permits A Union To Breach Commitments To The Union Minority On The Ground That Breach Is Favored By The Majority Conflicts With The Precedents Of This Court And The Courts Of Appeals

1. Beginning with *Steele v. Louisville & N.N.R. Co.*, 323 U.S. 192, 204 (1944), in which the Court first acknowledged a union's duty of fair representation "to represent the entire membership of the craft . . . without hostile discrimination, fairly, impartially, and in good faith," cases have universally recognized that the purpose of the duty is to protect individuals and union minorities from abusive exercise by the union majority of the union's exclusive representational power. 323 U.S. at 200; *Breininger v. Sheet Metal Workers Int'l*, 493 U.S. 67, 79 (1989) (duty is an essential means of enforcing the principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the *majority* of his coworkers.' " (quoting *Lockridge*, 403 U.S. at 301 (emphasis added))); *see also Rakestraw v. United Airlines, Inc.*, 989 F.2d 944, 947 (7th Cir. 1993) (Ripple, J., dissenting from denial of rehearing *en banc*); *Air Wisconsin Pilots Committee v. Sanderson*, 909 F.2d 213, 217 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991); *Haerum v. ALPA*, 892 F.2d 216, 221 (2d Cir. 1989); *Beardsley v. Chicago & North Western Transportation Co.*, 850 F.2d 1255, 1266-67 (8th Cir. 1988), *cert. de-*

nied, 489 U.S. 1066 (1989). A union violates the duty of fair representation to the union minority when its conduct is "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190.

When the court below followed the Seventh Circuit's recent decision in *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (1992) and held that ALPA's conduct here comports with the duty of fair representation because it represents the wishes of the majority of the union, it put itself directly at odds with the decisions of this Court and other courts of appeals. In *Rakestraw*, the Seventh Circuit rejected claims by union minorities on the ground that "the majority is entitled to prevail." 981 F.2d at 1531; *see also Rakestraw v. United Airlines, Inc.*, 989 F.2d at 947 (Ripple, J., dissenting from denial of rehearing *en banc*). The Fourth Circuit allied itself with this view of the duty of fair representation when it adopted the district court's opinion that the union majority could change ALPA's commitment to the Eastern minority after the minority had relied upon it. As the lower court found, "[o]nly when it became evident that it was the Eastern pilots who were likely to benefit from the implementation of the policy, . . . did the self interest of the acquiring airlines' pilots cause them to oppose vigorous implementation of the Policy" (App. 25a). The decision below approves this conduct on the ground that "minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority" (App. 42a).

In joining the Seventh Circuit's almost total deference to union majorities in *Rakestraw*, the Fourth

Circuit is in fundamental conflict with the very purpose for which the duty of fair representation was created by this Court. Obviously, if majority preference is, in and of itself, a sufficient justification for union sacrifice of minority contract rights, then the duty cannot, by definition, serve to protect union minorities from majority action.

2. The decision below, following *Rakestraw*, also puts the Fourth Circuit in conflict with decisions of the First, Second, Seventh and Ninth Circuits defining the test for "discrimination" violative of the duty of fair representation.[5] Each of those circuits holds that a union engages in discriminatory conduct when it makes decisions and sacrifices minority interests solely to benefit the majority. *Teamsters Local Union No. 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir. 1987); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-99 (7th Cir. 1976); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974); *Bernard v. ALPA*, 873F.2d 213, 217 (9th Cir. 1989).

For example, the First Circuit in *Teamsters Local 42* found that the union's endtailing for seniority purposes of the minority group of two employee groups merging to form a new local was discriminatory:

> [A] union may not neglect the interests of a membership minority solely to advantage the

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[5] *Rakestraw* dismissed the tri-partite standard discussed in *ALPA v. O'Neill*, *supra* as "conclusions—epithets rather than standards of conduct or tools of analysis," 981 F.2d at 1530, and suggested that the three prongs were subject to the same highly deferential standard: "Buzzwords such as 'bad faith' and 'arbitrary' being empty, *O'Neill* analogized the union's choice to that of a legislature, subject to the most deferential judicial review." 981 F.2d at 1532.

> membership majority. Union members are to be accorded equal rights, not subjugated arbitrarily to the desires of a 'stronger, more politically favored group. . . .'

825 F.2d at 611 (citations omitted). The union's insistence on endtailing, in the First Circuit's view, "constituted both discrimination in assigning seniority . . . and a breach of the union's duty fairly to represent all of its members." 825 F.2d at 613.

The Seventh Circuit has likewise disapproved of endtailing a group of employees "*solely* for the benefit of a stronger, more politically favored group." *Barton Brands, Ltd.*, 529 F.2d at 798-99. That Court distinguished other cases that had approved seniority determinations because in those cases the "affected employees . . . were [not] prejudiced by relinquishing other employment opportunities in reliance on the dovetailing arrangement" later withdrawn by the union. *Id.* at 800.[6] To the same effect is the Ninth Circuit decision in *Bernard*, where the Court approved a judgment that ALPA breached its duty of fair representation in violating the terms of its Merger Policy and negotiating the integration of the seniority lists of two merging carriers in a manner that discriminated against the less politically powerful group, which had been non-union prior to the merger. *See also Jones*, 495 F.2d at 797-98 (discriminatory to make seniority determination on basis of length of union membership).

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[6] The panel opinion in *Rakestraw* cited *Barton Brands* with approval, 981 F.2d at 1535, while the dissent from denial of rehearing *en banc* suggested that the panel decision was inconsistent with *Barton Brands*. 989 F.2d at 947.

The decision of the court below conflicts with the decisions of these circuits. The lower court explicitly concluded that there was evidence, sufficient to go to a jury, that "ALPA engaged in a unified strategy to evade and minimize its obligation to the Eastern pilots" because lateral transfer "was politically unpopular with the majority of the ALPA membership" (App. 35a). As in *Barton Brands*, 529 F.2d at 800, moreover, ALPA here did not write on a clean slate—its prior commitment to the Eastern pilots to secure lateral seniority, upon which they relied in determining to risk their jobs by striking, limited the action the union might otherwise have been able to take without violating its duty to the Eastern minority. When the court below approved ALPA's elimination of the Eastern pilots' rights to lateral transfer because "minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority" (App. 42a), it squarely rejected the discrimination rulings of the First, Second, Seventh and Ninth Circuits.[7]

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[7] The decision below also conflicts with the arbitrariness test articulated by this Court. This Court has never suggested that majority preference alone satisfies the test for rationality under the arbitrariness test, as the court below holds (App. 22a)("[a] union's decision to follow the wishes of the majority of its members is not merely rational, but is the very essence of union democracy."). This Court has, moreover, rejected analysis of union conduct in isolation from the "factual and legal landscape at the time of the union's actions." *ALPA v. O'Neill*, 499 U.S. at 67. The lower court's failure to consider the factual context—the union promises and the union interference with the acquiring carriers' willingness to hire Eastern pilots laterally—in determining that ALPA's conduct was rational misapplies the *O'Neill*

The Decision Below Raises Important Questions of Federal Labor Law And Policy Regarding The Extent Of The Protections Afforded Union Minorities Against Union Abuse Of The Exclusive Bargaining Authority

The decision below raises important questions of federal labor law and policy regarding the protections afforded union minorities against abuse of power by the union majority. The preemption of state contract claims in favor of a toothless duty of fair representation leaves union members in the Fourth Circuit with no meaningful remedy for a union's breach of contract and grants unions a license to make and break commitments to their members with impunity. By preempting state law remedies and making the principle of majority rule the touchstone under federal law, the court below distorted the purpose of the duty of fair representation and turned it from a shield for union minorities into a sword that unions may use to

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arbitrariness test. *See, e.g., Lewis v. Tuscan Dairy Farms, Inc.*, 829 F. Supp. 665, 667-69 (S.D.N.Y. 1993).

The lower court application of the bad faith test conflicts with decisions of the District of Columbia and Eighth Circuits. The First, Fifth and Seventh Circuits, now joined by the Fourth Circuit, take the view that strike promises later disavowed are in bad faith only if the union intended not to honor them when they were made. *Swatts v. United Steelworkers of America*, 808 F.2d 1221, 1224-25 (7th Cir. 1986); *O'Neill v. ALPA*, 939 F.2d 1199, 1201 (5th Cir. 1991); *Bautista v. Pan American World Airlines, Inc.*, 828 F.2d 546, 550 (9th Cir. 1987). The District of Columbia and Eighth Circuits hold that such promises are actionable without regard to the union's intent at the time the promises were made. *Warehouse Union 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981); *Anderson v. United Paper Workers Int'l Union, AFL-CIO*, 641 F.2d 574 (8th Cir. 1981); *cf. Belknap v. Hale*, 463 U.S. 508 (1983) (permitting suit against employer for strike promises and misrepresentations).

oppress those who hold unpopular views. This almost complete emasculation of the remedies available to injured minority union members raises important issues of federal labor law and policy of wide applicability which should be addressed and clarified by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 25, 1994

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RICHARD B. NELLIS; ANDREW R. HAWKINS; STUART HUGHES; EDWARD J. BREEN, JR.; RAYMOND T. BURKE; EDWARD L. FUGATE; FRED K. TESTA; WILLIAM T. GAFFNEY; VINCENT G. BROCKLEBANK,

Plaintiffs-Appellants,

v.

AIR LINE PILOTS ASSOCIATION; J. RANDOLPH BABBIT; HENRY A. DUFFY; FRANCIS J. KELKER; H. T. DODGE; ROBERT SHELTON; F. C. DUBINSKY; ARMAND JANZEN; JEROME MUGERDITCHIAN; RICHARD L. BURKE; CHARLES T. TULLY,

Defendants-Appellees.

No. 93-1310

RICHARD B. NELLIS; ANDREW R. HAWKINS; STUART HUGHES; EDWARD J. BREEN, JR.; RAYMOND T. BURKE; EDWARD L. FUGATE; FRED K. TESTA; WILLIAM T. GAFFNEY; VINCENT G. BROCKLEBANK,

Plaintiffs-Appellees,

v.

AIR LINE PILOTS ASSOCIATION; J. RANDOLPH BABBIT; HENRY A. DUFFY; FRANCIS J. KELKER; H. T. DODGE; F. C. DUBINSKY; ARMAND JANZEN; JEROME MUGERDITCHIAN; RICHARD L. BURKE; CHARLES T. TULLY,

Defendants-Appellants.

No. 93-1424

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, District Judge.
(CA-92-771-A)

Argued: October 28, 1993

Decided: January 24, 1994

Before HAMILTON, Circuit Judge, CHAPMAN, Senior Circuit Judge, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published per curiam opinion.

COUNSEL

ARGUED: Graeme Webster Bush, CAPLIN & DRYSDALE, CHARTERED, Washington, D.C., for Appellants. James Leon Lin-

sey, COHEN, WEISS & SIMON, New York, New York, for Appellees. **ON BRIEF:** James Sottile, IV, CAPLIN & DRYSDALE, CHARTERED, Washington, D.C., for Appellants. Stephen Presser, COHEN, WEISS & SIMON, New York, New York, for Appellees.

OPINION

PER CURIAM:

This case arises out of the dissolution of Eastern Airlines and involves a labor dispute between the pilots' union and former Eastern pilots. The bulk of the facts recited in this opinion are taken from the two district court opinions below.

Appellants are nine named plaintiffs who represent a class of over 2,400 former Eastern airline pilots. The latter were on the seniority list as of March 4, 1989, the date on which Eastern pilots went on strike. Appellees/cross-appellants are the Air Line Pilots Association, International ("ALPA" or the "Union") and ten of its former and present officials. At the time the events at issue took place, ALPA was the exclusive collective bargaining representative of the Eastern pilots, and also represented the pilots of a majority of other domestic airlines. In connection with its relations with each airline, the ALPA maintains a subordinate body known as a Master Executive Council ("MEC"), which functions as the coordinating council for ALPA-represented pilots at the airline and is comprised of elected individual pilots who represent that airline.

On March 4, 1989, the Eastern MEC voted to strike against the airline and the Eastern pilots went on strike. At that time, ALPA had in effect a Merger Fragmentation Policy which, according to appellants, obligated ALPA to take certain steps in the event part of an airline's assets were acquired by another ALPA carrier. Specifically, appellants contend that the Fragmentation Policy required ALPA to take all steps necessary to arrange for the transfer of Eastern pilots to the acquiring airlines and to ensure that the transferred pilots obtained at least some seniority for their years of service at Eastern.[1]

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[1]Eastern declared bankruptcy on March 9, 1989, and remained under the supervision of the Bankruptcy Court until January 18, 1991, when it

In their complaint in this case, the pilots contend that ALPA unlawfully induced them to strike by promising full compliance by the Union with the Fragmentation Policy in the event Eastern sold its assets or laid off pilots. In addition, the pilots assert that ALPA not only failed to comply with the Fragmentation Policy and with its promises to its pilots to negotiate on their behalf, but also that ALPA actively interfered with the pilots' attempts to secure employment with the acquiring carriers. In this litigation, the pilots state six counts against ALPA, alleging that: ALPA violated the federally mandated duty of fair representation (Count I), ALPA breached its contractual obligations in failing to honor the Fragmentation Policy (Count II), ALPA induced the pilots to rely detrimentally on promises to the pilots by ALPA to abide by the Fragmentation policy (Count III), ALPA tortiously interfered with the pilots' efforts to secure employment with other airlines (Count IV), ALPA officials breached their fiduciary duties to the union under section 501 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501, and ALPA unlawfully established a custodianship for the Eastern MEC in violation of 29 U.S.C. § 462 (Count VI).

In *Nellis v. Air Line Pilots Ass'n*, 805 F. Supp. 355 (E.D. Va. 1992) (*Nellis I*), Judge Thomas S. Ellis, III, granted summary judgment for ALPA with regard to the pilots' state law counts (Counts II, III, and IV). In so doing, Judge Ellis agreed with ALPA that the federal duty of fair representation preempts those common law state claims. Judge Ellis noted that labor unions may contractually obligate themselves to duties which exceed those embodied in their federal duty of fair representation. However, he concluded that the duties which the pilots sought to impose on the Union in this case were "mere refinements" of the federal duty of fair representation, and not "separate and distinct" from that duty. *Nellis I*, 805 F. Supp. at 360.

Following the decision of the district court below in *Nellis I*, ALPA sought summary judgment in connection with the remaining counts (I, V, and VI) of the complaint. After an extensive review of the

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ceased its operations and began liquidating its remaining assets. Before the period of bankruptcy supervision ended, Eastern had already sold many of its assets.

record, Judge Ellis determined in *Nellis v. Air Line Pilots Ass'n*, 815 F. Supp. 1522 (E.D. Va. 1993) (*Nellis II*), that as to Count I, the Union did not violate its federal duty of fair representation established under 45 U.S.C. § 152. *Id.* at 1530-34, 1538-40. In that regard, the district court found that the Union's conduct was not "arbitrary, discriminatory, or in bad faith," the standard set forth in *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372 (1990) (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). The district court, however, rejected ALPA's argument that the pilots' duty of fair representation claims based on actions which occurred in 1989 and 1991 were barred by the six-month statute of limitations. *Nellis II*, 815 F. Supp. at 1538.

With regard to Count V, the district court determined that the appellant pilots could not assert a derivative claim under 29 U.S.C § 501 on behalf of ALPA against the Union officials because the ALPA itself suffered no harm. *Id.* at 1541-42. Finally, as to Count VI, Judge Ellis concluded that ALPA's imposed custodianship over the Eastern MEC conformed with ALPA's constitution as well as with federal law. *Id.* at 1542-53.

In the instant appeal, the pilots challenge the district court's grant of summary judgment in favor of ALPA and its officials on counts I-V in the pilots' complaint.[2] In their cross-appeal, ALPA challenges the district court's ruling with regard to whether the pilots' duty of fair representation claims are time barred.

We hereby adopt the thorough reasoning of the district court in *Nellis I* and *Nellis II* granting summary judgment for ALPA on Counts I-V. We agree, for the reasons set forth by the district court in those opinions, that the common law state claims stated by appellants are preempted by federal law, that the Union did not violate its federal duty of fair representation, and that the pilots do not have a viable claim against the Union officials under 29 U.S.C. § 501. In the light of the resolution of those issues on the merits, we need not and do not reach the limitations issue.

AFFIRMED

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[2]Appellants do not appeal the district court's grant of summary judgment on Count VI.

APPENDIX B
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 92-771-A

RICHARD B. NELLIS, *et al.*,

Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, *et al.*,

Defendants.

FILED

MAR 3 1993

CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

MEMORANDUM OPINION

This class action labor dispute grew out of widely-lamented demise of Eastern Airlines, Inc. ("Eastern"). More specifically, the case involves an allegation by former Eastern pilots that their union failed to represent their interests fairly during the breakup of Eastern and the subsequent sale of its assets to other airlines. Resolution of defendants' motion for summary judgment requires the Court to address novel questions concerning the scope of the federal duty of fair representation.

I.

The class action is brought by nine named plaintiffs on behalf of themselves and a class of over 2,400 former pilots of Eastern. The class consists of all pilots on the Eastern

seniority list as of March 4, 1989, who went on strike on that date and remained on strike until the end of the strike on November 22, 1989. The defendants are the Air Line Pilots Association, International ("ALPA" or the "Union") and ten of its former and present officials.

ALPA was, at all times relevant to this action, the authorized bargaining representative of the plaintiffs. ALPA is a national labor organization which represents airline pilots at over thirty airlines. It is a unitary labor organization, with a single Constitution and By-Laws governing all subordinate bodies and members. At each of the operating airlines employing ALPA members, ALPA has a Master Executive Council ("MEC") composed of representatives elected from the airline's pilot employees. An MEC functions as the coordinating council for the ALPA-represented employees at each airline. At the national level, ALPA is governed by a Board of Directors, an Executive Board, and an Executive Committee, in descending order of authority.

On March 4, 1989, the Eastern pilots went on strike against Eastern. Plaintiffs allege that, prior to and at the time the Eastern pilots were considering whether to go on strike, ALPA promised that if the strike forced Eastern to curtail its operations and dispose of all or part of its assets, ALPA would strive to obtain jobs for the striking pilots, with no resulting loss in seniority, at whatever carrier or carriers eventually acquired the Eastern assets. Plaintiffs contend that ALPA later reneged on this obligation, and that ALPA's failure to negotiate on their behalf constituted a breach of the duty of fair representation imposed by federal law.

Five days after the commencement of the strike, Eastern filed a petition in the United States Bankruptcy Court for the Southern District of New York pursuant to Chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1101, *et seq.* From that time until January 18, 1991, Eastern continued to

operate under the supervision of the bankruptcy court. During this period, with the approval of the bankruptcy court, Eastern leased and sold various assets to several other carriers. In July 1989, the bankruptcy court approved Eastern's proposal to sublease fourteen B-727 aircraft to Pan American World Airways, Inc. ("Pan Am"). In October 1989, the court approved Eastern's plan to transfer sixteen DC-9 aircraft and several international routes to Midway Airlines, Inc. ("Midway"). In addition, in May 1989, USAir, Inc. ("USAir") made a written offer to purchase fifteen B-757 aircraft and several gates, takeoff/landing slots, and international routes from Eastern. This transaction was never consummated.[1]

Meanwhile, the Eastern pilots ended their strike on November 22, 1989. On January 18, 1991, Eastern ceased all operations and has since been in the process of liquidating its remaining assets. In early February 1991, the Bankruptcy Court for the Southern District of New York held an auction to sell Eastern assets. At the auction, Delta Air Lines, Inc. ("Delta") purchased ten L-1011 aircraft, three international routes and several gates and takeoff/landing slots; United Air Lines, Inc. ("United") purchased 21 slots and three gates at Chicago's O'Hare International Airport; Northwest Airlines, Inc. ("Northwest") purchased sixty-seven slots and ten gates at Washington's National Airport; and USAir purchased six slots at Laguardia Air-

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[1] No explicit reference was made to the proposed 1989 USAir transactions in plaintiffs' complaint or first amended complaint. On November 20, 1992, a magistrate judge of this court denied plaintiffs' motion to amend their complaint to include explicit reference to the proposed transaction. This Court subsequently affirmed that ruling. Plaintiffs contend, however, that a broad reading of the first amended complaint would allow recovery based on the proposed transaction. Because inclusion of the proposed transaction does not affect the Court's disposition of this case, the Court will assume, *arguendo*, that the first amended complaint encompasses the proposed 1989 USAir transaction.

port and two of Eastern's Canadian routes.[2] Most of the Eastern estate was either sold to non-ALPA carriers such as Continental or American Airlines, or repossessed by Eastern's creditors. Eastern did not require any airline to hire Eastern pilots with lateral seniority as a condition of purchasing Eastern assets in the February 1991 auction.

In all of these transactions, both prior to and after Eastern ceased operations, plaintiffs contend that ALPA either failed to negotiate on their behalf for jobs with lateral seniority rights or worse, actively obstructed plans to hire plaintiffs to jobs with lateral seniority. Plaintiffs argue that there were two sources of ALPA's obligation to negotiate on their behalf for jobs with pre-hire seniority: (1) ALPA's "Merger Policies," a written set of principles ratified by the ALPA Board of Directors, and (2) various promises made by ALPA and its officers, prior and subsequent to the decision to strike, regarding ALPA's intent to implement the Merger Policies to protect the rights of striking Eastern pilots. The relevant part of the Merger Policies is a section entitled Fragmentation Policy which, in contrast to the more general provisions of the Merger Policies, contemplates transactions in which the seller of assets retains its own identity and does not merge completely with the acquiring entity. At the time of the strike, the Fragmentation Policy was applicable, by its own terms, "in cases of sales, transfers, purchase, acquisitions, reallocations, farm outs, abandonments, dismemberment or other similar fragmentation of existing operations or route systems or portions thereof. . . ." ALPA's obligations in such situations were outlined in the same version of the Fragmentation Policy as follows:

> ALPA shall take all appropriate actions necessary to protect the affected pilots including a request for adequate labor protective provisions

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[2] Plaintiffs have abandoned all claims arising from the transactions in which United and Northwest acquired Eastern assets.

> from the appropriate government agency and/or the company or companies involved, the timely enforcement of all contractual provisions in existence, and also assist the affected MECs in opening and processing negotiations with their managements in accordance with Section 6 of the Railway Labor Act. The objective of these actions shall be to produce the desired crew member protection and to maintain a status quo situation until appropriate agreement can be reached with the carrier managements. ALPA must take all steps to establish . . . [t]he right of an appropriate number of pilots from the donor carrier to become employees of the carrier acquiring the operations or route. . . . Questions of number, eligibility, seniority equities and methods of selection of the flight deck operating crew members involved in said move shall be resolved in accordance with appropriate provisions of the Merger Policy and Procedures, i.e. Negotiations, Mediation and Arbitration.

Pl. Tr. Ex. 208.

ALPA altered its Fragmentation Policy on three occasions subsequent to the Eastern pilots' decision to strike. First, in December 1989, the ALPA Executive Board issued an "interpretation" of the Fragmentation Policy outlining guidelines on the Policy's implementation. The December 1989 interpretation required ALPA to request the "carrier management(s) involved for assurances that pilots will be allowed transfer of employment as determined under ALPA Merger Policy." If, on the basis of this request, carrier management did not give reasonable assurances, ALPA was directed to implement the Fragmentation Policy "through contractual provisions in existence (which cover transfer opportunities)," and to consider use of Section 6 negotiations. ALPA was also directed to request labor protective provisions from the appropriate

government agency. Finally, the December 1989 interpretation stated that the ALPA "President or Executive Committee may recommend further action as appropriate to be taken to implement Merger Policy as interpreted herein."[3] Pl. Tr. Ex. 41.

Next, in May 1990, ALPA amended the provision in the Fragmentation Policy which controlled applicability of the Policy. The new provision declared that an applicability determination would be made by the ALPA Executive Committee, based on such considerations as whether the relevant transaction reduced pilot staffing requirements at the carrier disposing of the assets or whether it increased staffing requirements at the acquiring carrier. Pl. Tr. Ex. 49.

Finally, in October 1991 ALPA again amended the provision defining applicability of the Fragmentation Policy, adding the following language:

> Fragmentation Policy shall apply if the acquiring carrier declares an intent to acquire assets of another carrier, and the carrier agrees to employ any pilots in conjunction with the assets it acquires and to integrate transferring pilots in accordance with ALPA Merger Policy or an

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[3] ALPA argues that this interpretation obligated ALPA "to take three steps—and *only* three steps—to persuade the Acquiring Airlines to accept the transfer of . . . pilots with lateral seniority:" (1) a request to management of the acquiring airline for an agreement on lateral transfer, (2) review of existing contractual language for provisions requiring management to accept lateral transfer, and (3) consideration of whether to open Section 6 negotiations. Def. Br. at 33. Plaintiffs, by contrast, contend that the provision entitling the President or Executive Committee to take further "appropriate" action must be read in conjunction with the text of the Policy, which requires that ALPA "take all steps" to facilitate transfer of pilots to the acquiring airline. Plaintiffs also contend that ALPA's reinterpretation of the Fragmentation Policy, with the possible result that the Union owed fewer obligations to the Eastern pilots, was itself a breach of ALPA's obligations to the pilots.

> otherwise mutually satisfactory substitute. In the event a carrier does not intend to employ and integrate transferring pilots in accordance with ALPA Merger Policy, or an otherwise mutually satisfactory substitute, the president shall urge the acquiring carrier to do so.[4]

Pl. Dep. Ex. 99.

In addition to the formal Fragmentation Policy, plaintiffs argue that ALPA obligated itself to negotiate on their behalf for jobs with lateral seniority at the acquiring carriers by a number of promises made specifically to the Eastern pilots around the time of the pilots' decision to strike. First, there is vague reference in the deposition of two Eastern pilots to a promise made by ALPA President Henry Duffy, on March 3, 1989, that ALPA Fragmentation Policy would protect the pilots' seniority rights. *See* Dobson Dep. at 45-47; Fugate Dep. at 41-42, 55.[5] Second, on March 13, 1989, the Executive Board passed a resolution finding the Fragmentation Policy applicable "to the current situation at [Eastern]." Third, on March 14, 1989, ALPA issued a press release containing the following language:

> [T]he Executive Board assured Eastern pilots that protections would be provided for them in case of a piecemeal sale or transfer of Eastern aircraft and routes. Such protections would include the right of Eastern pilots to become employees of the carrier acquiring any part of Eastern's op-

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[4] As with the prior "interpretation" of Fragmentation Policy, plaintiffs argue that these amendments to the Policy "gutted" the effectiveness of the provision and, therefore, constituted a breach of ALPA's obligations to the plaintiffs.

[5] The specific terms of any commitment made by Duffy at this meeting are not in the record and, thus, any such promise made by Duffy at that time cannot be evaluated by the Court in connection with the present motion.

> eration and preservation of seniority, but are subject to negotiation between Eastern pilots and the pilots and management of an acquiring airline. In essence, pilots at the acquiring airline will refuse to fly former Eastern routes and aircraft absent such protections for Eastern pilots.

Pl. Dep. Ex. 14. Fourth, on April 19, 1989, ALPA sent a videotape to the striking pilots in which President Duffy stressed the Executive Board's decision that Eastern pilots would transfer "with the jobs and with the equipment." Pl. Tr. Ex. 602. Delta representative Jim Suchow also stated in the videotape that he would urge the Delta MEC to support seniority integration. *Id.* Fifth, on July 12, 1989, ALPA's Executive Board passed a resolution affirming that the Fragmentation Policy was applicable to the transfer of fourteen B-727 aircraft from Eastern to Pan Am. Pl. Dep. Ex. 10. Sixth, on July 12, 1989, ALPA sent a videotape to the striking pilots in which President Duffy stated that the Executive Board had defined merger policy to apply to "any future asset transfers that we are likely to encounter from the bankruptcy court" and that "we are going to make every effort to be sure that Eastern pilots go with [the transferred assets]." Pl. Tr. Ex. 604. Seventh, on July 14, 1989, ALPA President Duffy wrote a letter to all ALPA pilots informing them of the actions of the Executive Board on March 13, and July 12 and stating that the Executive Board's actions meant that "Eastern pilots go with Eastern assets in a fair and equitable manner to be determined under merger policy." Pl. Dep. Ex. 11. Eighth, ALPA issued a press release on September 13, 1989, stating that the March 13 Executive Board resolution "mandat[ed] that Eastern pilots *would* be transferred with their seniority intact to any other ALPA carrier that may acquire Eastern aircraft or routes." Pl. Tr. Ex. 254.

Plaintiffs contend that despite these numerous expressions of support for the Eastern pilots, ALPA, under pres-

sure from the MECs at carriers other than Eastern, actually blocked opportunities for the Eastern pilots to be hired with lateral seniority rights. With regard to the 1989 Pan Am transaction, there is deposition testimony from Robert Gould, Pan Am's senior vice president of operations, that Pan Am management was prepared to hire Eastern pilots with lateral seniority in accordance with ALPA Fragmentation Policy, but that opposition within ALPA, specifically from the Pan Am MEC, eventually caused Pan Am to hire pilots from elsewhere. According to Gould, "We didn't hire the Eastern pilots because ALPA failed to reach a unified position on applicability and/or implementation of its own fragmentation policy." Gould Dep. at 30.

In relation to the 1989 Midway transaction, the plaintiffs point to deposition testimony of Jerry Mugerditchian, Midway MEC Chairman, who states that the Chairman of Midway's Board of Directors, David Hinson, told him that Midway would consider hiring Eastern pilots with lateral seniority if Mugerditchian could convince the Midway pilots to accept that arrangement. *See* Mugerditchian Dep. at 41-42; Pl. Dep. Ex. 210 at 2. Plaintiffs contend that because Eastern pilots were not ultimately hired by Midway in connection with the transaction, a fair inference is that ALPA's inaction in implementation of the Fragmentation Policy torpedoed the deal.[6]

In connection with the proposed 1989 USAir transaction, the USAir management explicitly conditioned the trans-

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[6] This inference is contradicted by a later portion of Mugerditchian's deposition in which he testifies that in a subsequent meeting with Hinson he, Mugerditchian, represented that the Midway pilots supported lateral integration of the Eastern pilots. Hinson responded that Midway had not expected Mugerditchian to garner the support of the Midway pilots, and that Midway management had no intention of hiring Eastern pilots despite the position of the Midway MEC. *See* Mugerditchian Dep. at 43.

action on the requirement that Eastern pilots, qualified to fly the acquired aircraft, would be transferred to USAir with lateral seniority. Dwain Andrews, USAir's Vice President for Labor Relations, testified that he met with representatives of ALPA pilots of USAir and Piedmont (which had previously been acquired by USAir) and that these representatives informed him that lateral integration of Eastern pilots would present "a lot of questions, a lot of issues [and] problems" and that they did not look on the proposal "favorably." Andrews Dep. at 65. According to Andrews, ALPA never adopted the position that Eastern pilots should be hired by USAir with any form of pre-hire seniority. As a result, USAir began considering plans to staff the acquired aircraft with existing USAir and Piedmont pilots. Ultimately, the 1989 transaction was never consummated; there is no evidence in the record as to the reason for the failure of the deal.

With respect to the 1991 Delta transaction, there is evidence that Robert Shelton, Chairman of the Delta MEC, wrote to J. Randolph Babbitt, President of ALPA, arguing that the Fragmentation Policy did not apply to the Delta transaction, because Eastern, at that point, had ceased operations. Shelton argued that because Eastern's staffing requirements were currently at zero, the sale of its assets could not possibly reduce Eastern's staffing needs—a requirement for applicability of the revised Fragmentation Policy. *See* Pl. Dep. Ex. 55. Several days later Babbitt wrote to Delta management and asked whether Delta would give assurances that it would accept Eastern pilots with seniority, if ALPA determined that the Fragmentation Policy applied. *See* Pl. Dep. Ex. 32. Delta management responded with the same theory that Shelton had advanced in his letter to Babbitt. *See* Pl. Tr. Ex. 98. Plaintiffs argue that the clear inference from this set of circumstances is that Shelton went to Delta's management, argued that the Fragmentation Policy did not apply, and procured Delta's refusal to hire Eastern pilots with lateral seniority.

With respect to the 1991 USAir transaction, Armen Janzen, Chairman of the USAir MEC made a presentation to the Executive Committee on May 20, 1991, arguing that the Fragmentation Policy did not apply to the transaction. President Babbitt wrote to USAir management, as he had to Delta's asking for assurance that USAir would accept Eastern pilots with seniority, in the event that ALPA determined that the Fragmentation Policy applied. Seth Schofield, President and Chief Operating Officer of USAir, responded that USAir would not hire Eastern pilots, either with or without seniority, because the transaction had not increased USAir's staffing requirements, a predicate for the application of the policy. Moreover, even if it had, Schofield noted that USAir was contractually bound to make new positions available to numerous USAir pilots who were on furlough or faced pending furlough. Plaintiffs argue that this "parallelism indicates that Mr. Janzen communicated his views to USAir." Pl. Br. at 22.

Plaintiffs do not dispute that ALPA took actions in *pro forma* compliance with the Fragmentation Policy in connection with every transaction at issue here. But in plaintiffs' view this is not dispositive. Plaintiffs claim that the language in the Fragmentation Policy directing ALPA to take "all appropriate actions" and "all steps" on behalf of affected pilots required ALPA to do more than: (1) formally request the acquiring carriers to hire Eastern pilots with lateral seniority, (2) search existing contractual provisions for enforceable labor protective provisions, and (3) investigate the possibility of opening negotiations between management and the affected MECs under Section 6 of the Railway Labor Act ("RLA"). Specifically, plaintiffs argue that ALPA's failure to negotiate vigorously on their behalf, to present a united front on behalf of *all* ALPA pilots in support of seniority integration, and to threaten negative repercussions if airline management did not accede to the Union's demands, constituted a breach of ALPA's duty of fair representation.

On April 24, 1990, the ALPA Executive Committee passed two resolutions determining that the Pan Am and Midway MECs had discharged their responsibilities in connection with the 1989 transactions. Pl. Dep. Ex. 164. The question whether ALPA had fully complied with the Fragmentation Policy with respect to the February 1991 transactions was placed on the agenda for the July 23-25, 1991, Executive Committee meeting. Prior to the meeting, however, the Eastern MEC asked that resolution of the matter be deferred, pending discussions between the Eastern MEC and the Eastern bankruptcy trustee concerning possible efforts by the trustee to persuade acquiring carriers to hire Eastern pilots with lateral seniority. The Executive Committee agreed to this deferral, "pending a report" on the discussions. *See* Pl. Tr. Ex. 341-A.

Discussion between the Eastern MEC and Martin Shugrue, the bankruptcy trustee, yielded an agreement executed on August 15, 1991 (the "Shugrue Agreement"). Under the terms of the Shugrue Agreement, the Eastern MEC would enter a settlement of various claims that the Eastern MEC had brought against Eastern on the condition that Shugrue succeed, by December 31, 1991, in obtaining commitments, from various airlines acquiring Eastern assets, to hire a specified number of Eastern pilots with lateral seniority rights. On the basis of this agreement the ALPA Executive Committee, at its September 24-26, 1991, meeting, again resolved to defer final resolution of whether the terms of the Fragmentation Policy had been fully met "pending only regular reports on implementation of the [Shugrue Agreement], and subject to further consideration in the event of a relevant change in circumstances." Pl. Tr. Ex. 164.

Despite extensive effort, Shugrue failed in his attempt to obtain any jobs with lateral seniority for the Eastern pilots by December 31, 1991, and thus the settlement out-

lined by the Shugrue Agreement never became effective.[7] The ALPA Executive Committee never formally resolved the issue of whether ALPA's Fragmentation Policy obligations with respect to the February 1991 transactions were completely satisfied.

On December 3, 1991, the ALPA Executive Committee passed a resolution imposing a custodianship on the Eastern MEC. By the terms of the resolution, the custodianship became effective on January 1, 1992. The Eastern MEC appealed the Executive Committee's decision to the ALPA Executive Board, which denied the appeal in May 1992.

The plaintiffs filed their initial complaint in this action on June 3, 1992, and an amended complaint on July 8, 1992. Count I of the complaint alleges that ALPA breached the federally-created duty of fair representation. Counts II, III, and IV were dismissed by Order and Memorandum Opinion of this Court, dated November 3, 1992, in which the Court held that plaintiffs' state law claims were preempted by the federal duty of fair representation. *See Nellis v. ALPHA*, ___ F. Supp. ___ (E.D. Va. 1992). Count V alleges that certain ALPA officials breached section 501 of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501. Count VI asserts that ALPA's establishment of a custodianship for the Eastern MEC violated 29 U.S.C. § 462. The matter is now before the Court on defendant's motion for summary judgment with respect to plaintiffs' remaining claims—Counts I, V, and VI.

II.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on

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[7] Plaintiffs contend that Shugrue was unable to succeed in his negotiations because of the defendants' efforts to block any agreement that resulted in lateral seniority for the Eastern pilots.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P.; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Baber v. Hospital Corp. of America*, 977 F.2d 872, 874 (4th Cir. 1992). "A district court must grant summary judgment if, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an essential element of that party's case."*Id.* at 874 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

"[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. Finally, "in reviewing the evidence submitted by the parties . . ., [the Court] must view all evidence in the light most favorable to the non-moving party." *Baber*, 977 F.2d at 875. Applying these principles to the instant case, the Court is convinced that summary judgment must be entered on behalf of the defendants.

III.

Because the Union's fair representation duty is the focus of Count I, analysis of that claim appropriately begins with a consideration of the nature and scope of that duty.

Section 2(a) of the RLA grants a duly elected union the exclusive authority to represent all employees in a collective bargaining unit. 45 U.S.C. § 152, Second. Federal courts have long held that the grant of this exclusive right implicitly imposes a corresponding duty on a bargaining representative. Thus, it is undisputed between the parties

that " 'as the exclusive bargaining representative of the employees, . . . the Union had a statutory duty fairly to represent all of those employees . . . .' " *United Steelworkers of America v. Rawson,* 110 S. Ct. 1904, 1911 (1990) (*quoting Vaca v. Sipes,* 386 U.S. 171, 177 (1967)). Under the duty of fair representation doctrine, ALPA's " 'statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.' " *Id.* The Supreme Court has been careful to note, however, that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, International v. O'Neill,* 111 S. Ct. 1127, 1135 (1991). As a result, the Court has stated that "a breach [of the duty of fair representation] occurs 'only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.' " *Rawson,* 110 S. Ct. at 1911 (*quoting Vaca,* 386 U.S. at 190).

Plaintiffs have, at different points in their argument, alleged that defendants' actions were, at various times, arbitrary, discriminatory, *and* in bad faith. Each of these categories will be considered in turn. First, the Court rejects plaintiffs' contention that ALPA's interpretation and implementation of the Fragmentation Policy with respect to the Eastern pilots was, in any sense, arbitrary. The Supreme Court has properly articulated a deferential standard for evaluating a union's actions for "arbitrariness." In order to prevent a court from substituting "its own view of the proper bargain for that reached by the union," the Court has held that a union's action "may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of

reasonableness' that it is wholly 'irrational' or 'arbitrary.' " *O'Neill*, 111 S. Ct. at 1135-36 (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

While the parties disagree concerning whether ALPA fulfilled its representational obligations to the plaintiffs, the parties are at least in tacit agreement that any shortcoming in ALPA's representation was not a consequence of capricious or irrational action by ALPA. As the ample record makes manifest, ALPA's position on the implementation of the Fragmentation Policy was the result of an extensive series of meetings of ALPA's Executive Committee, in which the Committee meticulously parsed the language of the Merger Policy and delineated exactly what actions ALPA was required to undertake on behalf of the Eastern pilots. Clearly, ALPA's failure to negotiate with sufficient vigor to appease the Eastern pilots was a result of the simple fact that ALPA also represented pilots at the airlines that acquired Eastern assets. As a result, ALPA found itself in a position in which the interests of various subgroups of its membership were in conflict with one another.

Negotiations for enhanced seniority for the Eastern pilots at the acquiring airlines necessarily impacted on the relative position of the pilots already working for the acquiring airlines. It is uncontradicted in the record, and not surprising given the nature of the situation, that the initial opposition to application of the Fragmentation Policy came from the MECs at the airlines acquiring Eastern assets. After all, pilots at these acquiring airlines faced the prospect of Eastern pilots being hired to positions with seniority over them. Opposition of the MECs at the acquiring airlines eventually led ALPA's national leadership to temper its commitment to vigorous negotiation on behalf of the Eastern pilots for positions with lateral seniority.

Though plaintiffs may disagree with ALPA's decision to accede to the wishes of the pilots at the acquiring airlines,

they cannot argue that it was *irrational* for ALPA to do so, particularly since the Eastern pilots were outnumbered by the pilots, also represented by ALPA, whose self-interest would lead them to oppose seniority integration. A union leadership's decision to follow the wishes of the majority of its members is not merely rational, but is the very essence of union democracy. *See, e.g., Rakestraw v. United Airlines, Inc.*, 1992 U.S. App. LEXIS 33705, *30 (7th Cir. 1992) ("If the union's leaders took account of the fact that the workers at the larger firm preferred this outcome, so what? Majority rule is the norm."). Thus, while some of plaintiffs' arguments pose difficult questions under the duty of fair representation doctrine, the Court has little trouble concluding that ALPA's actions in the present context were neither irrational nor arbitrary.

Neither have the plaintiffs adduced any evidence of bad faith on the part of the Union. As evidence of ALPA's bad faith, plaintiffs appear to rely exclusively on the fact that ALPA undertook certain negotiating obligations pursuant to the Fragmentation Policy and then allegedly failed to fulfill those obligations. Yet the mere fact that a union has made certain promises, but not fulfilled them, does not mean that the promises were made in bad faith. When analyzing a union's conduct for "bad faith" in this context, courts have consistently required proof that the promises made by the union were "intentionally misleading." *Swatts v. United Steelworkers of America*, 808 F.2d 1221, 1225 (7th Cir. 1986); *see also O'Neill v. Air Line Pilots Ass'n, International*, 919 F.2d 1199, 1202-03 (5th Cir. 1991); *Bautista v. Pan American World Airlines, Inc.*, 828 F.2d 546, 550-51 (9th Cir. 1987).[8] In other words, proof of a union's

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[8] In *Local No. 48 v. United Brotherhood of Carpenters & Joiners*, 920 F.2d 1047, 1054 (1st Cir. 1990), the First Circuit held that union leadership could be found to have acted in bad faith if it intentionally misled its membership *or* if it acted in a "palpably unconscionable or outrageous" fashion. The court further held, however, that evaluation

bad faith requires a showing that the union never intended to keep its promises.

No such evidence exists here; nothing in this record supports an inference that ALPA ever undertook a commitment to the Eastern pilots that it did not intend to honor. Rather, the record indicates that ALPA national leadership initially promulgated the provisions of the Fragmentation Policy dealing with lateral seniority integration in the sincere belief that such a regime would be beneficial to the career security of *all* ALPA pilots. *See* Letter of ALPA President Harry Duffy, July 14, 1989, Pl. Dep. Ex. 11 ("[W]e must find a system of 'portable' seniority to protect our fellow pilots whose careers are shattered by such catastrophic circumstances as [carrier fragmentation] . . . . I hope that we have now matured enough as a union to realize that we *must* protect our own.") Similarly, the ALPA membership had reason to support the principle of lateral integration so long as it remained a generality, from which they were as likely to benefit as to be harmed. Only when it became apparent that Eastern would be the fragmented airline, that Eastern pilots would be the beneficiary of the Fragmentation Policy, and that the pilots at the other carriers were the ones who would be relatively disadvantaged, did the majority of ALPA membership, and eventually the ALPA national leadership, flag in its support for lateral integration. While the plaintiffs may justifiably be upset that ALPA did not hold firm to its initial enthusiasm for seniority integration in the face of the majority of its members who had reason to oppose the policy, plaintiffs cannot argue that ALPA's initial promulgation of the policy, or ALPA's early statements in support of the policy, were intended to be "intentionally misleading"

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of a union's conduct for unconscionability or outrageousness was essentially the same inquiry as whether the union had violated the duty of fair representation by acting arbitrarily. *Id.*

to the plaintiffs. Accordingly, the Court finds no evidence of "bad faith" on the part of the Union.[9]

Finally, this Court must assess whether ALPA's alleged refusal to fulfill its obligations under the Fragmentation Policy for the benefit of the Eastern pilots could be found to be discriminatory. "The objective of the duty of fair representation is to provide substantive and procedural safeguards for minority members of the collective bargaining unit." *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2nd Cir. 1974); *see also Beardsly v. Chicago & North Western Transp. Co.*, 850 F.2d 1255, 1266-68 (8th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989). Accordingly,

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[9] Plaintiffs also contend that statements made by some of the individual defendants indicate the bad faith necessary to form the basis of a breach of the duty of fair representation. For instance, plaintiffs point to the arguments made to the ALPA Executive Committee by Delta MEC Chairman Robert Shelton and USAir MEC Chairman Armen Janzen that Fragmentation Policy should not apply to the assets acquired by their respective airlines at the February 1991 bankruptcy auction. Plaintiffs also cite a letter written by the USAir MEC to its members referring to the substantial effort it had undertaken in "defending you against former Eastern Airlines pilot's claims to jobs." Pl. Tr. Ex. 389.

These statements are not evidence of bad faith. As shown above, ALPA owed conflicting representational duties. Under the ALPA organizational structure it was inevitable that certain members of the ALPA leadership hierarchy, *i.e.* the MEC representatives of the acquiring carriers, would espouse positions contrary to the interests of the Eastern pilots. It is not necessary to accept the defendants' argument, that the ALPA Merger Policies "contemplate that the affected MECs act in an *adversarial* manner . . . advocat[ing] solely the interests of [their] own pilots," Def. Br. at 8-9, in order to discern that any organization, faced with duty of representing disparate interests, will have internal disputes, and that the individuals entrusted with preserving the interests of a particular subgroup will make statements contrary to the interests of an opposing subgroup. The fact that the MECs at the acquiring carriers opposed application of the Fragmentation Policy is not evidence that ALPA *intentionally misled* the plaintiffs by promulgating and initially voicing support for the lateral seniority integration provisions of the Policy.

"a union may not neglect the interests of a membership minority solely to advantage the membership majority." *Teamsters Local Union No. 42 v. NLRB,* 825 F.2d 608, 611 (1st Cir. 1987).

The factual circumstances in the instant case raise the possibility that the plaintiffs were treated in a discriminatory fashion. Until it became obvious which airline faced fragmentation of its assets, pilots at all the carriers stood an equal chance of benefitting under the Fragmentation Policy. Only when it became evident that it was the Eastern pilots who were likely to benefit from the implementation of the policy, to the relative disadvantage of the pilots at the acquiring airlines, did the self interest of the acquiring airlines' pilots cause them to oppose vigorous implementation of the Policy. Thus, when Eastern began disposing of its assets to other carriers, the Eastern pilots were thrust into the position of advocating a minority interest within ALPA, as the sole group favoring forceful implementation of the Fragmentation Policy. As a minority interest group within ALPA, the Eastern pilots were entitled to protection against discrimination.

Existing precedent in this circuit and elsewhere is unclear on precisely what constitutes impermissible discrimination by a union against a minority interest within the union's membership. Obviously, a rule that always vindicates the interests of a minority would eviscerate the concept of union democracy. The entire premise of democracy is that majority interests will generally prevail over the minority. *See Rakestraw,* 1992 U.S. App. LEXIS 33705 at *30. Thus, there must be some limiting principle to the concept that a union must refrain from taking actions injurious to the interests of one of its minority subgroups. *See Humphrey v. Moore,* 375 U.S. 335, 349 (1964) ("we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it rep-

resents nor in supporting the position of one group of employees against that of another").

At least one influential decision has implied that discrimination against a minority is impermissible, only when it is either arbitrary (*i.e.* "not based on some rational consideration") or in bad faith. *See Jones,* 495 F.2d at 798. If this formulation were adopted here, plaintiffs would have no colorable claim of impermissible discrimination because, as shown above, defendants' actions were neither arbitrary nor in bad faith. This result, while not without superficial appeal, would be incorrect, as it would render the term "discriminatory" redundant and meaningless. The Court cannot accept the premise that the "arbitrary, discriminatory, or in bad faith" standard enunciated by the Supreme Court in 1967, *Vaca,* 386 U.S. at 190, and since cited by innumerable courts as a tripartite test, is actually a bipartite "arbitrary or in bad faith" standard. Rather, a fairer reading of the *Vaca* language dictates that certain actions by a union may constitute impermissible discrimination without involving arbitrary or bad faith conduct.

No reported decision has fully come to grips with the competing concerns implicated in protecting the rights of minorities within a union. While the test for impermissible discrimination must be broader than merely arbitrary or bad faith conduct, it cannot be so broad that it unduly disrupts the functioning of democratic decision-making within the union. With these competing concerns in mind, this Court adopts the following proposition: while a union is free to establish its internal policies on the basis of majority rule, the union is not free to ignore properly enacted and promulgated policies whenever such a course is convenient or beneficial to the majority of the union's membership. In other words, a union is bound to follow its official policies unless and until they are amended by means approved under the union's constitution.

As applied to the facts of the present case, the Court holds that while ALPA was free to take any position it desired on the lateral integration of pilots in the event of carrier fragmentation, it could not, even at the behest of the majority of its membership, disregard its policy on that issue once the policy was established and a subgroup of the ALPA membership stood ready to benefit from it. If, as plaintiffs allege, ALPA failed to implement the Fragmentation Policy, as promulgated in ALPA's official Merger Policies, that failure would constitute impermissible discrimination against the plaintiffs in violation of ALPA's duty of fair representation.

Certain of plaintiffs' claims do not rely upon the theory of impermissible discrimination as delineated above and, because plaintiffs have failed to adduce any evidence of arbitrariness or bad faith, these claims cannot, as a matter of law, go forward. This is true of plaintiffs' claim that ALPA, over time, impermissibly "gutted" the effectiveness of the Fragmentation Policy, by means of the December 1989 interpretation of the Policy and the May 1990 and October 1991 amendments to the Policy. Respect for the process of union democracy compels the conclusion that ALPA was free to take any position it desired on the issue of lateral seniority integration in the event of carrier fragmentation. The fact that ALPA's commitment to seniority integration eroded over time, and that this change was reflected in amendments to the language of the Fragmentation Policy, is not an actionable violation of the duty of fair representation.[10]

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[10] Plaintiffs may understandably take little consolation from the Court's holding that while ALPA was not permitted to ignore the Fragmentation Policy to plaintiffs' detriment, ALPA was free to alter the Policy in such a way as potentially to deprive plaintiffs of the Policy's benefits. The fact remains, however, that it is simply not discriminatory for a union to alter its policy by means of procedures in accordance with the union's constitution, which procedures presumably give all subgroups an opportunity to participate in the union decision-

Similarly, plaintiffs can make no valid claim for defendants' alleged interference with negotiations under the Shugrue Agreement. No official ALPA policy required ALPA to take any position with respect to the negotiations between Shugrue, the Eastern bankruptcy trustee, and the managements of the acquiring airlines. Thus, even if plaintiffs' allegations are true, and it was the actions of the defendants that resulted in the failure of the Shugrue Agreement, this occasions no actionable claim for breach of the duty of fair representation. Because ALPA did not have a policy with respect to such situations, there can be no argument that ALPA administered its policies in a discriminatory fashion.

Finally, plaintiffs can make no successful claim with respect to the proposed 1989 USAir transaction. As it existed in 1989, the Fragmentation Policy applied only to "sales, transfers, purchase, acquisitions, [etc.]" of carrier assets. Because the proposed USAir transaction involved only an offer, not a consummated deal, ALPA incurred no Fragmentation Policy obligations with respect to the transaction. In the absence of specific obligations under its internal policies, ALPA cannot be held to have impermissibly discriminated against the plaintiffs.

Accordingly, if plaintiffs have a valid claim under the duty of fair representation, it must be based on a showing that ALPA violated the express terms of its Fragmentation Policy in connection with completed transactions in 1989 or 1991.

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making process. Minorities derive protection from the fact that such modifications of policy are subject to the continuing requirement that a union avoid arbitrary or bad faith conduct. *See Jones*, 495 F.2d at 798 ("[a] union has broad discretion to adjust the demands of competing groups within its constituency as long as it does not act arbitrarily"). Moreover, requiring a union to adhere to its constitutional procedures for altering union policy ensures that any policy reversal will receive a certain degree of scrutiny from the union membership. Such visibility places limits on the union's ability to engage in discriminatory conduct.

IV.

As a threshold matter, the Court must determine whether the claims related to the 1989 or the 1991 transactions are barred by the statute of limitations. A six month statute of limitations applies to a union member's claim of breach of the duty of fair representation under the RLA. *See Meekins v. United Transp. Union,* 946 F.2d 1054, 1057 (4th Cir. 1991).[11] "A claim for such a breach accrues

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[11] Plaintiffs, in a supplemental memorandum in opposition to defendants' motion for summary judgment, argue that the Supreme Court's decision in *Reed v. United Transp. Union,* 488 U.S. 319 (1989), casts doubt on whether the six month statute of limitations applies to all duty of fair representation actions. The Supreme Court had held in *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983), that the six month period set forth in section 10(b) of the National Labor Relations Act ("NLRA") should be applicable to an employee's hybrid action against both an employer for breach of a collective bargaining agreement and a union for breach of the duty of fair representation. *Reed,* however, cautioned that *Del Costello* should be read as a narrow exception to the general rule that statutes of limitation for analogous state offenses should ordinarily be borrowed to define the limitations period for federal offenses. Several courts, subsequent to *Reed,* have held that the six month NLRA period should not be applicable to some duty of fair representation claims, when such claims stand alone, as in the instant case, and are not, as in *Del Costello,* part of a hybrid action. Specifically, courts have held that the six month period is not applicable to non-hybrid actions when the "dispute is entirely internal to the union." *Brenner v. Local 514,* 927 F.2d 1283, 1295 (3rd Cir. 1991); *accord Phelan v. Local 305,* 973 F.2d 1050, 1061 (2nd Cir. 1992) (six month period not applicable to non-hybrid duty of fair representation claims that do "not have a direct and immediate impact on union-management relations").

While there is some merit to plaintiffs' contention that the six month NLRA limitations period should not apply not apply in all duty of fair representation cases, there are two problems with plaintiffs' argument in the present context. First, there is the Fourth Circuit's decision in *Meekins,* decided after *Reed* (and *Brenner*), which unequivocally states that the six month limitations period is applicable to non-hybrid duty of fair representation claims. 946 F.2d 1057. No exception equivalent to that set forth in *Brenner* was considered. *Id.* (although it is possible

when the plaintiff knows, or should have known, that the grievance procedure has been exhausted or otherwise broken down." *Id.*

As mentioned above, the ALPA Executive Committee passed a resolution on April 24, 1990, to the effect that ALPA had completely fulfilled its Fragmentation Policy obligations with respect to the 1989 transactions. Thus, plaintiffs knew by that date, at the latest, that their efforts to goad ALPA into further action on their behalf in connection with these transactions had definitively failed. Because this lawsuit was not commenced until June 3, 1992, plaintiffs concede that unless this Court adopts plaintiffs' "continuing violation" theory (see discussion *infra.*), the claims with respect to the 1989 transactions must be barred by the six month statute of limitations.

The situation with respect to the February 1991 transactions is less clear. Defendants argue that, in light of the totality of the circumstances, plaintiffs must have known prior to December 3, 1991, that ALPA was not going to make any further negotiating effort on their behalf in connection with these transactions, and therefore, that the lawsuit filed on June 3, 1992, must be barred by the six month statute of limitations. In particular, defendants stress that the Eastern MEC wrote letters to ALPA President Babbitt dated June 14, 1991, and July 10, 1991,

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that the Fourth Circuit may have felt no need to address the merits of *Brenner* because the claim in *Meekins* was clearly not "entirely internal to the union"). Second, even if this Court were to accept the premise that state statutes of limitations apply in some non-hybrid duty of fair representation cases, the instant case appears to be a claim for which the NLRA limitations period *should* be applicable. The gravamen of plaintiffs' complaint is that ALPA did not sufficiently negotiate on plaintiffs' behalf with the acquiring airlines. Accordingly, judgment in favor of the plaintiffs would likely have "a direct and immediate impact" on relations between ALPA and future acquiring airlines, and thus, the claim cannot be characterized as "entirely internal to the union." *C.f. Brenner,* 927 F.2d at 1295; *Phelan,* 973 F.2d at 1061.

charging that the MECs of the acquiring carriers were "engaged in a flagrant attempt to frustrate the objectives of [the Fragmentation Policy]." Pl. Dep. Ex. 47; *see also* Pl. Dep. Ex. 254. These letters, defendants argue, clearly indicate that plaintiffs knew, at the time the letters were written, that ALPA, through its MECs, had failed to comply with its Fragmentation Policy obligations.

Contrary to defendants' contention, however, the letters in question unmistakably indicate that the Eastern MEC had not abandoned the hope of convincing ALPA national leadership to override the intransigence of the acquiring carriers' MECs and to mandate vigorous implementation of the Fragmentation Policy. Furthermore, the actions of ALPA's national leadership in response to these letters did not foreclose the possibility that ALPA would put additional pressure on the MECs or the managements of the acquiring airlines to hire Eastern pilots with lateral seniority. Instead, the ALPA Executive Committee placed the issue of whether the MECs at the acquiring airlines had fully complied with their Fragmentation Policy obligations on the agenda for the Committee's July 23-25, 1991, meeting. The Executive Committee later agreed, at the Eastern MEC's behest, to defer resolution of the matter during the pendency of the negotiations leading up to the Shugrue Agreement. Then, because of the possibility that Shugrue would succeed in his negotiations and acquire lateral seniority jobs for the Eastern pilots, the Executive Committee again deferred the matter, "pending only regular reports on implementation of the [Shugrue Agreement], and subject to further consideration in the event of a relevant change in circumstances." The Executive Committee has, to date, never enacted a final resolution on whether ALPA has definitively fulfilled its obligations under the Fragmentation Policy with respect to the 1991 transactions.

Because the plaintiffs never received final notification that ALPA would take no further action on their behalf with respect to the 1991 transactions, it is difficult to pinpoint exactly when the plaintiffs knew, "or should have known, that the [union] grievance procedure [had] been exhausted or otherwise broken down." *Meekins*, 946 F.2d at 1057. As defendants argue, eventually plaintiffs must be deemed to have known that ALPA did not intend to take further measures, solely by reason of the inaction of the Executive Committee. Plaintiffs are correct, however, that because the Executive Committee deferred action in contemplation of negotiations under the Shugrue Agreement, it was not remarkable from the plaintiffs' perspective that the Executive Committee failed to act during the pendency of the negotiating period set forth in that agreement. Only after the Shugrue Agreement had lapsed did the Committee's inaction reasonably raise the inference that ALPA was unwilling to proceed further on the plaintiffs' behalf. By its terms, the Shugrue Agreement gave Shugrue until December 31, 1991, to try to acquire jobs for the Eastern pilots. Thus, whenever the plaintiffs cause of action accrued with respect to the February 1991 transactions, it was sometime *after* December 31, 1991. As a result, plaintiffs' suit with respect to these transactions, filed June 3, 1992, was timely under the six month statute of limitations.

Defendants argue, in the alternative, the plaintiffs' cause of action accrued, not when ALPA refused to take action with respect to the individual transactions, but rather when ALPA "interpreted" the Fragmentation Policy in December 1989 to limit the Union's responsibilities in fragmentation situations. In support of this argument, defendants cite *Local Lodge No. 124 v. NLRB*, 362 U.S. 411 (1960) ("*Bryan Manufacturing*"), which held that, for statute of limitations purposes, an unfair labor practice charge accrued when a union executed an allegedly unlawful collective bargaining agreement, not when the agreement,

valid in all respects other than in its formation, was actually enforced. Defendants argue by analogy that in this case, the harm to the plaintiffs arose from ALPA's amendment of the Fragmentation Policy, not from the subsequent implementation of the Policy with respect to individual transactions.

This argument is without merit. Plaintiffs' alleged harm does not arise exclusively from their claim that ALPA watered down the Fragmentation Policy and then enforced that Policy on a number of separate occasions. Instead, plaintiffs contend that defendants' actions were so deficient that the defendants did not even fulfill their obligations under the weakened Fragmentation Policy. Taken as true, the allegations charge a violation of plaintiffs' rights with respect to each individual transaction. In the lexicon of the decisions in this area of the law, ALPA's actions constituted a "continuing violation." As such, a new cause of action, with a separate statute of limitations, accrued each time that ALPA failed to abide by its Policy. *C.f. National Advertising Co. v. Raleigh*, 947 F.2d 1158, 1166-1168 (4th Cir. 1991) (finding no "continuing violation" because harm to plaintiffs occurred at enactment of ordinance, not subsequent enforcement or ordinance), *cert. denied*, 118 L. Ed. 2d 593 (1992).

Plaintiffs argue that the "continuing violation" doctrine saves not only those claims that fall inside the limitations period, but also those claims outside the period—specifically, the claims based on the 1989 transactions. As the Fifth Circuit has recently explained,

> [T]he continuing violation doctrine embraces two types of cases. The first includes cases in which the original violation occurred outside the statute of limitations, but is closely related to other violations that are not time-barred. In such cases, recovery may be had for all violations, on the theory that they are part of one, continuing vi-

> olation. . . . The second type of continuing violation is one in which an initial violation, outside the statute of limitations is repeated later; in this case, each violation begins the violation period anew, and recovery may be had for at least those violations that occurred within the period of limitations.

Hendrix v. Yazoo City, 911 F.2d 1102, 1103 (5th Cir. 1990). Plaintiffs contend that, in this case, ALPA's actions should be characterized as a unified strategy to evade its responsibilities under the Fragmentation Policy and not as a series of individual determinations to decline to apply the Fragmentation Policy to particular transactions. As such, defendants' actions would constitute a "continuing violation" of the first type identified by *Hendrix*, and recovery should be allowed for both the 1991 transactions within the limitations period, *and* the 1989 transactions outside the period.

The Court confesses some uneasiness with the theory underlying the "first type" of "continuing violation." The determination critical to application of the doctrine, whether the acts outside the limitations period are sufficiently similar to acts inside the period such that the entire course of action should be viewed as a "continuing violation," appears to be an essentially standardless inquiry. No court has articulated a satisfying test or formulation that would meaningfully limit the doctrine's application. Nevertheless, the theory appears to be firmly grounded in federal jurisprudence. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (statute of limitations for Fair Housing Act, 42 U.S.C. § 3612(a), does not bar claims based on five incidents, four of which were outside limitations period, when claims "are based not solely on isolated incidents . . . , but a continuing violation manifested in a number of incidents"); *Brenner*, 927 F.2d at 1295-96 (applying "continuing violation" theory to union member's claims against union to preserve claims based on events

outside the limitations period). Accordingly, despite reservations concerning the "continuing violation" theory being applied in this fashion, the Court will endeavor to implement the appropriate standard and determine whether ALPA's actions can accurately be characterized as "a continuing violation manifested in a number of incidents" or, instead, as a series of "isolated incidents." *Havens Realty*, 455 U.S. at 381.

The Court's task is made substantially easier by the fact that the question is presented on defendants' motion for summary judgment. As the Fourth Circuit has recently held, "In general, issues of fact bearing on the application of a statute of limitations are submitted, as are other issues of fact, for determination by the jury." *Fowler v. Land Management Groupe, Inc.*, 978 F.2d 158, 162 (4th Cir. 1992). Thus, whether or not ALPA's actions amounted to a "continuing violation" throughout the years 1989, 1990, and 1991 is a question that must ultimately be decided by the jury, and this Court need only determine whether plaintiffs have submitted sufficient evidence for a reasonable jury to find in plaintiffs' favor. *See Taylor v. Home Insurance Co.*, 777 F.2d 849, 856-57 (4th Cir. 1985) (approving district court's submission of "continuing violation" question to the jury), *cert. denied*, 476 U.S. 1142 (1986).

Based on this standard, the issue must be for the jury, for there is no doubt that plaintiffs have produced sufficient evidence to create a factual issue on whether ALPA's actions constituted a "continuing violation." Under plaintiffs' theory, ALPA's national leadership reached a determination in 1989 that obtaining jobs with lateral seniority at the acquiring carriers for the Eastern pilots would be politically unpopular with the majority of the ALPA membership. As a result, according to plaintiffs, ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots under the Fragmentation Policy. If plaintiffs' theory is accepted, then ALPA's ac-

tions would indeed constitute a "continuing violation." In the Court's view, a reasonable jury could draw sufficient inferences from the factual record to accept plaintiffs' theory. As a consequence, summary judgment is inappropriate. Because plaintiffs have properly alleged a "continuing violation" encompassing both the 1989 and the 1991 transactions, and because the cause of action with regard to the 1991 transactions accrued inside the six month statute of limitations period, the Court declines to enter summary judgment, on statute of limitations grounds, on any of plaintiffs' claims.

V.

As explained above, defendants' actions would only be a breach of the duty of fair representation if defendants violated the express terms of the duly-enacted Fragmentation Policy. After full consideration of the matter, and taking the evidence in the light most favorable to the plaintiffs, the Court ultimately concludes that no reasonable fact-finder could find that ALPA violated the terms of the Policy.

There are two provisions in the version of the Fragmentation Policy applicable to the 1989 transactions that set forth ALPA's obligations to the pilots of a fragmented airline. First, the Policy states, "ALPA shall take all appropriate actions necessary to protect the affected pilots .... The objective of these actions shall be to produce the desired crew member protection ...." Subsequently, the Policy states, "ALPA must take all steps to establish ... [t]he right of an appropriate number of pilots from the donor carrier to become employees of the carrier acquiring the operations or route."

Plainly, the first provision can be interpreted as a requirement that ALPA take some action to obtain seniority integration for the pilots of a fragmented carrier. ALPA's obligation under this provision, however, is expressly lim-

ited to "all *appropriate* actions." Similarly, ALPA's goal under this provision is not necessarily full seniority integration, but rather "the *desired* crew member protection." Without question, the policy was written in such a fashion as to preserve a degree of flexibility for ALPA in determining what constitutes "appropriate" action and the "desired" crew member protection.

Anticipating that this Court would be forced to rule on whether ALPA had, in fact, taken "appropriate" actions on behalf of the plaintiffs, the parties have devoted significant argument to the proper level of deference courts owe to a union's interpretation of its own instruments of governance. The Fourth Circuit, it appears, has not spoken definitively on this issue, while other federal courts have developed differing formulations to express the deference due in this situation.[12] It is unnecessary, however, to try to anticipate how the Fourth Circuit would articulate the standard of deference generally owed to a union in this context. In this case, the language used to express the union's policy explicitly reserves for the union a certain degree of discretion in implementing the policy. When reviewing a union's decision under a policy that expressly

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[12] The alleged split among the circuits on this issue is more apparent than real. All courts that have addressed the topic agree that substantial deference is due. The only difference among the circuits is how they have chosen to express the circumstances upon which a court can reject a union's interpretation. Thus, the Sixth Circuit has suggested that the union's interpretation must be "fair and reasonable." *Millwright Local No. 1079 v. United Brotherhood of Carpenters & Joiners*, 878 F.2d 960, 965 (6th Cir.), *cert. denied*, 493 U.S. 965 (1989). The Ninth Circuit has held that the union interpretation should not be disturbed by a court "absent bad faith or special circumstances." *Motion Picture & Videotape Editors Guild, Local 776 v. Local 695*, 800 F.2d 973, 975 (9th Cir. 1986), *cert. denied*, 483 U.S. 1022 (1987). The First Circuit has ruled that a union's interpretation will be upheld unless it is "patently unreasonable." *Local No. 48*, 920 F.2d at 1052. It is doubtful that these semantical differences in expressing the standard would, in practice, lead to divergent results.

vests such discretion in the union leadership, this court must plainly accord the highest degree of deference to the union's decision. *See, e.g. Local No. 48,* 920 F.2d 1047, 1051 ("Courts have neither a monopoly on fairness nor a sufficient expertise in the administration of labor organizations to warrant pervasive judicial intervention in union affairs."). Review on any lesser standard would cause this Court to run the risk of attempting "to substitute its own view . . . for that reached by the union." *O'Neill,* 111 S. Ct. 1127. Accordingly, the standard this Court will employ in reviewing ALPA's implementation of the Fragmentation Policy is whether ALPA's decision with respect to the "appropriate actions" to take on plaintiffs' behalf was "patently unreasonable." *Local No. 48,* 920 F.2d at 1052.

ALPA's determination of what constituted an "appropriate" response to the 1989 transactions was not "patently unreasonable." In fact, ALPA took a number of steps beneficial to the interests of the Eastern pilots. First, prior to the Bankruptcy Court's approval of the asset transfers, ALPA objected to the transfers because they did not include commitments by the acquiring carriers to hire Eastern pilots with lateral seniority. *See* Copeland Dep. at 300. Second, the ALPA Executive Committee passed resolutions notifying all concerned parties, including management and pilots at the acquiring carriers, that ALPA considered the Fragmentation Policy applicable to the transfer of Eastern's assets to Pan Am and Midway. With respect to Pan Am, where management initially showed some willingness to hire Eastern pilots with lateral seniority, the Executive Committee authorized appointment of a Neutral Facilitator to "assist in achieving an expedited, fair and equitable" seniority integration plan. In connection with the Midway transaction, Midway MEC Chairman Mugerditchian met with Midway management to represent that he had the support of the Midway pilots for hiring Eastern pilots on terms that included lateral seniority integration.

Because neither Pan Am nor Midway ultimately hired Eastern pilots with any form of pre-hire seniority, plaintiffs argue that ALPA did not negotiate vigorously enough on their behalf, and accordingly that ALPA violated its obligations under the Fragmentation Policy. Plaintiffs contend that ALPA could easily have put "teeth" in its negotiating stance by causing its members to undertake collective action, such as refusal to fly the newly acquired aircraft, work slowdowns, or work stoppage, unless the acquiring aircraft, work slowdowns, or work stoppage, unless the acquiring carriers agreed to hire Eastern pilots with lateral seniority. The Court does not believe, in light of ALPA's conflicting representational duties, that the decision not to undertake such measures was "patently unreasonable." While such actions may have been permissible means of forwarding ALPA's aims, they were not required by the terms of the Fragmentation Policy. Had the ALPA membership desired that ALPA be forced to take specific steps to force airline managment to accede to demands for seniority integration, the Fragmentation Policy could have been written to detail those specific steps. That was not done. Instead, the Policy plainly vests the ALPA leadership with the discretion to determine what actions are "appropriate" when seeking to achieve commitments for seniority integration.[13]

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[13] An example of ALPA's ability to commit itself to specific means of implementing a negotiating position is contained in the section of its Merger Policies devoted to actual mergers. In that section, the policy states:

> R. *Work Stoppage in Merger Cases*
>
> ALPA is directed and all of the members hereby bind themselves to use maximum pressure, including work stoppage, to achieve necessary protection for all flight deck operating crew members involved.

Pl. Tr. Ex. 208. No similar provision exists in the section of Merger Policies devoted to fragmentation of airlines.

Likewise, plaintiffs cannot avail themselves of the second provision of the Fragmentation Policy setting forth ALPA's obligations to the pilots of a fragmented airline. That provision states that ALPA must take *all* steps to establish the right of an appropriate number of pilots from the fragmented airline to become employees of the acquiring airlines. Significantly, however, the provision makes no mention of whether such employment must be coupled with seniority rights. There is no dispute that ALPA formulated and implemented a program for Eastern pilots throughout the period of 1989-91 in which those pilots would receive preferential consideration by other carriers as "new hires." While the actual terms of the program are not in the record, there has been no allegation from the plaintiffs that the program was inadequate in meeting its goal. Rather, plaintiffs challenge the sufficiency of the goal of the program, contending that the Fragmentation Policy required ALPA to negotiate for jobs with lateral seniority for the Eastern pilots, not for "new hire" positions. By the plain language of the provision in question, however, ALPA met its obligation to establish the right of the plaintiffs "to become employees of the [acquiring] carriers[s]." As a result, the Court finds no evidence of discriminatory implementation of the Fragmentation Policy with respect to the 1989 transactions.

As outlined above, by the time of the 1991 transactions, ALPA had reinterpreted and amended the Fragmentation Policy.[14] Pursuant to the December 1989 interpretation, ALPA was required to request the "carrier management(s) involved for assurances the pilots will be allowed transfer of employment as determined under ALPA Merger Pol-

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[14] By the terms of the 1990 amendment, the ALPA Executive Committee was required to make a preliminary determination on the applicability of the Fragmentation Policy. At its meeting on May 20, 1991, the Executive Committee found the Fragmentation Policy applicable to the February 1991 transactions.

icy." If ALPA did not receive reasonable assurances, it was directed to implement the Fragmentation Policy through existing contractual provisions and to consider use of Section 6 negotiations. Plaintiffs do not dispute that all of these actions were undertaken in connection with the 1991 transactions, in technical compliance with the terms of the Fragmentation Policy. Plaintiffs contend, however, that the duty of fair representation obligated ALPA to take further action on their behalf under the authority conferred by the December 1989 interpretation to the effect that the "President or Executive Committee may recommend further action as appropriate to be taken to implement Merger Policy . . . ."

This argument fails; in this respect the Policy is permissive, not mandatory. Moreover, as with the 1989 version of the Fragmentation Policy, plaintiffs are placed in the position of challenging ALPA's determination of what was "appropriate" action, when the Policy clearly vests discretion in the Union leadership to define what actions are "appropriate." This Court cannot substitute its judgment of what actions were "appropriate" for that of the Union. *See O'Neill*, 111 S. Ct. at 1127. As long as the determination is not "patently unreasonable," it is for the Union leadership, not this court, to decide what actions are "appropriate" means of implementing ALPA policy. In light of ALPA's conflicting representational duties to Eastern and non-Eastern pilots, it was certainly not "patently unreasonable" for ALPA to decide that strict compliance with the steps outlined by the Fragmentation Policy, with no further action recommended by the President or the Executive Committee, was the "appropriate" means of carrying out its obligations under the Policy.

In sum, ALPA complied with the literal terms of its Fragmentation Policy with respect to every transaction challenged by the plaintiffs. It is true that ALPA met its obligations with significantly less enthusiasm or resolve than plaintiffs expected would be the case. Nevertheless,

minorities within a union must expect that the union leadership will frequently make decisions adverse to their interests, if those interests are in conflict with the interests of the majority. As discussed above, ALPA could only be found to have *impermissibly* discriminated against the plaintiffs, if, in acting against the minority's interests, it violated the terms of a duly ratified union policy. Because there is no evidence that ALPA failed to comply with the literal terms of the Fragmentation Policy, summary judgment is properly entered against plaintiffs on Count I of the complaint.[15]

VI.

Count V alleges that the individual defendants, all past and present officials of ALPA, violated fiduciary duties

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[15] The Court's holding is not altered by the existence of specific promises made to the Eastern pilots concerning ALPA's commitment to negotiate for lateral seniority jobs. A review of the promises indicates that most were merely promises that ALPA Fragmentation Policy would be applied to the situation at Eastern. As explained above, the Fragmentation Policy *was* applied to each of the challenged transactions, albeit with disappointing results from the Eastern pilots' perspective. The remaining "promises" were simply too vague to represent commitments, the breach of which would constitute a violation of the duty of fair representation. Thus, promises by President Duffy to the Eastern pilots that they would transfer "with the jobs and with the equipment" or that "we are going to make every effort to be sure that Eastern pilots [transfer with seniority]" added nothing to the express commitments set forth in ALPA Fragmentation Policy as to ALPA's obligations in a fragmentation situation. Similarly, the "press releases" issued by ALPA purported only to relate the actions of the ALPA Executive Committee. Thus, to the extent that the press releases expressed commitments different from, and more expansive than, the commitments expressly adopted by the Executive Committee, it was not reasonable for plaintiffs to rely on these statements as "promises" made by the ALPA leadership. Even if any of these "promises" could be construed as an enforceable commitment by ALPA to the plaintiffs, plaintiffs have produced no evidence to indicate that the promises were "intentionally misleading" so as to constitute "bad faith" as required in connection with the duty of fair representation.

owed to the Union under section 501 of the LMRDA, 29 U.S.C. § 501. Section 501(a) provides, in relevant part:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

29 U.S.C. § 501(a). Section 501(b) authorizes a member of a labor union to sue an individual who has violated section 501(a) in order to recover damages or secure other appropriate relief "for the benefit of the labor organization." 29 U.S.C. § 501(b). Plaintiffs bring their claim under section 501(b) seeking: (1) an injunction prohibiting the individual defendants from breaching their fiduciary duties to ALPA by failing to implement the Fragmentation Policy and (2) recovery of ALPA funds expended by the individual defendants in the course of breaching their fiduciary duties.[16]

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[16] The Court assumes, without deciding, that section 501 imposes

In section 501 suits, the plaintiff sues derivatively "for the benefit of the labor organization." 29 U.S.C. § 501(b); *see also Building Material and Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 506 (9th Cir. 1989) (Plaintiff in section 501 suit "acts in a representative capacity for the benefit of the union and on behalf of the union. [Plaintiff] cannot seek to recover damages personally, but must seek a remedy for the union as a whole."). Bearing this in mind, and in light of the Court's disposition of Count I, it is clear that Count V also must fail.

As shown in the foregoing discussion, ALPA complied with the literal terms of its Fragmentation Policy in connection with every transaction at issue in this lawsuit. Thus, the Union as a whole has no claim that any individual defendant violated a fiduciary duty by failing to implement union policy. Plaintiffs can assert no derivative claim on behalf of ALPA, because ALPA itself has no claim against its officials.

There is no question that plaintiffs have produced competent evidence that supports the inference that some MEC Chairmen took actions contrary to plaintiffs' interest in vigorous implementation of the Fragmentation Policy. Such evidence is not, however, sufficient by itself to support an action under section 501. Instead, section 501 requires a showing that the union itself suffered harm. As long as a union leadership remains in compliance with the union's internal policies, then the union itself suffers no harm,

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broad fiduciary duties on union officials in all their functions and is not limited to situations implicating the officials' custodianship of the "money and property" of the union. *See, e.g., Stelling v. International Brotherhood of Electrical Workers, AFL-CIO*, 587 F.2d 1379, 1385-87 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979); *Richardson v. National Post Office Mail Handlers*, 442 F. Supp. 193, 195 (E.D. Va. 1977), *remanded without opinion*, 612 F.2d 1309 (4th Cir. 1979). *But see, e.g., Gurton v. Arons*, 339 F.2d 371, 375 (2nd Cir. 1964) (section 501 applies only when monetary interest of union is involved). The Fourth Circuit has not yet addressed this issue.

even if subgroups within the union are disadvantaged. A contrary holding would lead to untenable results whenever, as here, a union appointed officials to represent discrete subgroups of its membership. Without a requirement that the union as a whole be harmed, the loser of any internal union dispute could always sue the representatives of the winners, alleging breach of fiduciary duty under section 501 for taking a position contrary to the loser's interests. That is plainly not the law, and accordingly, plaintiffs cannot sue members of the ALPA leadership merely because they advocated positions, not in violation of ALPA's internal policies, that were contrary to the interests of the subgroup to which plaintiffs belonged. Consequently, summary judgment is appropriate with respect to Count V of the complaint.

VII.

In Count VI of the complaint, plaintiffs allege that ALPA imposed a custodianship over the Eastern MEC in violation of 29 U.S.C. § 462. Plaintiffs contend that the custodianship was imposed to silence the Eastern MEC and to replace its leadership with a custodian sympathetic to the aims of the ALPA leadership.

Section 462 provides:

> Trusteeship shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

29 U.S.C. § 462. ALPA's constitution authorizes ALPA "to take emergency action to provide representation for the pilots in the service of any airline which interrupts or ceases all or substantially all operations or which is conducting operations after filing of bankruptcy or reorganization proceedings or pending liquidation . . ." Pl. Dep. 1, Art. XXI, Sec. 1. Federal law further provides that:

> a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws . . . shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462. . . .

29 U.S.C. § 464.

The threshold question, therefore, is whether the custodianship over the Eastern MEC was imposed in conformity with ALPA's constitution. Plaintiffs argue that, because the custodianship provision of the constitution authorizes ALPA "to take emergency action to provide representation" for pilots at a troubled airline, ALPA may only impose a custodianship when pilots at a troubled airline are not receiving adequate representation from their MEC. This argument runs counter to a plain reading of the ALPA constitution, which authorizes a custodianship over an MEC at "any airline" which has ceased operations or filed a bankruptcy petition. Contrary to plaintiffs' contention, the constitution does not require a preliminary showing that the pilots at a troubled airline were receiving inadequate representation prior to the imposition of the custodianship. Defendants correctly point out that it is the cessation of operations or the filing of a bankruptcy petition that is the sole triggering event for ALPA's authority, not

the lapse in the representational functions at the affected MEC.[17]

Because the custodianship was imposed in conformity with ALPA's constitution, ALPA gains the benefit of the presumption of validity pursuant to 29 U.S.C. § 426. Accordingly, plaintiffs can challenge the validity of the custodianship only by "clear and convincing" evidence that the custodianship was not established for a legitimate purpose. Plaintiffs have presented *no* evidence that the custodianship was imposed for an impermissible purpose, other than to dispute ALPA's purported legitimate reasons for imposition of the custodianship.[18] Even if all factual disputes are resolved in plaintiffs' favor, and ALPA's proffered rationale is entirely discredited, there is still no affirmative evidence that ALPA's actions were motivated by impermissible concerns. Plaintiffs must rely exclusively on the negative inference, arising from the lack of a legitimate purpose, to establish that ALPA acted with an illegitimate motivation. No reasonable fact-finder could, solely on the basis of this negative inference, find that plaintiffs had satisfied their burden of proving an illicit motive by "clear and convincing" evidence. Summary judgment is therefore appropriate on Count VI of the complaint. *See Anderson*, 477 U.S. at 252 (Court should consider "substantive evidentiary standard of proof that

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[17] Defendants note that a custodianship has been created over the MEC at every ALPA carrier that has filed for bankruptcy and terminated commercial flight operations since this provision was added to the ALPA constitution in 1984.

[18] ALPA contends that the custodianship was imposed for the purpose of "restoring democratic procedures" at the Eastern MEC and "otherwise carrying out the legitimate objects of [the] labor organization." 29 U.S.C. § 462. Specifically, ALPA claims that MEC and Local Council elections had not been held within the Eastern MEC, that accurate membership rosters had not been maintained, and that the Eastern MEC had not retained adequate control over its finances.

would apply at the trial on the merits" when assessing motion for summary judgment).

VIII.

For the foregoing reasons, the Court holds that summary judgment must be entered on all of plaintiffs' remaining claims. An appropriate order has issued.

/s/ T. S. Ellis, III
United States District Judge

Alexandria, Virginia
March 3, 1993

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 92-771-A

RICHARD B. NELLIS, *et al.*,

Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, *et al.*,

Defendants.

MEMORANDUM OPINION

This class action labor dispute presents a novel question regarding the scope of the preemptive effect of federal labor law. The plaintiff class, composed of airline pilots formerly employed by Eastern Air Lines, Inc. ("Eastern"), allege that their exclusive collective bargaining representative, the Air Line Pilots Association, International ("ALPA"), induced them to go on strike by promising that ALPA would ensure that, in the event that assets of Eastern were sold and pilots were accordingly laid off, the pilots would be rehired with seniority by the airlines that acquired the assets. When this did not occur, plaintiffs brought this action, alleging a breach of the federally-created duty of fair representation, as well as several state causes of action.

The matter comes before the Court on the defendants' motion for dismissal of Counts II, III, and IV of the First Amended Complaint, all of which are premised on state law, on the ground that the claims therein are preempted by the federally created duty of fair representation. For the reasons detailed below, the Court grants the defendants' motion and dismisses Counts II, III, and IV of the First Amended Complaint.

Facts

This class action is brought by nine named plaintiffs on behalf of themselves and a class of over 2,400 former Eastern pilots. This class consists of all pilots on the Eastern seniority list as of March 4, 1989, who went on strike on that date and remained on strike until November 22, 1989. The defendants are ALPA and ten of its former and present officials. ALPA was, at all times relevant to this action, the authorized bargaining representative of the plaintiffs. It is a unitary labor organization, with a single Constitution and By-Laws governing all subordinate bodies and members. At each of the operating airlines employing ALPA members, ALPA has a Master Executive Council ("MEC") composed of representatives elected from the pilot employees at that airline. The MEC's function as the coordinating council for the ALPA-represented employees at each airline.

Pursuant to its authority under ALPA's constitution, the ALPA Executive Board had adopted the so-called Fragmentation Policy prior to the strike. According to plaintiffs, the Fragmentation Policy obligated ALPA to take certain actions in the event that airline assets (*i.e.* aircraft, routes, etc.) were transferred from one ALPA-represented carrier to another. In particular, plaintiffs contend that the Fragmentation Policy required ALPA to negotiate with a purchaser of assets to ensure that pilots from the seller of those assets were hired with some form of pre-hire seniority, thereby providing those pilots with greater entitlements than they would otherwise have received as newly hired employees.

On March 4, 1989, the Eastern pilots went on strike against the airline. They allege that ALPA induced them to strike by assuring them that ALPA would meet and fulfill its obligations under the Fragmentation Policy. Five days after the commencement of the strike, Eastern filed a petition in the United States Bankruptcy Court for the

Southern District of New York pursuant to Chapter 11 of the Bankruptcy Code. 11 U.S.C. § 1101, *et seq.* From that time until January 18, 1991, Eastern continued to operate under the supervision of the bankruptcy court. During this period, with the approval of the bankruptcy court, Eastern leased and sold various assets to other carriers. Meanwhile, the Eastern pilots ended their strike on November 22, 1989. On January 18, 1991, Eastern ceased all operations and has since been in the process of liquidating its remaining assets. Plaintiffs allege that ALPA never fulfilled its Fragmentation Policy obligations to the pilots and never made good on the representations calculated to induce the pilots to strike. To the contrary, plaintiffs assert, ALPA, at the behest of the MEC's of the acquiring carriers, actively obstructed the plaintiffs' efforts to gain employment with pre-hire seniority.

In the present action, plaintiffs assert six counts on behalf of themselves and the class. In Count I they contend that ALPA has breached the federally mandated duty of fair representation. In Count II they allege a breach of contract, based on ALPA's failure to honor the provisions of the Fragmentation Policy. Count III is a quasi-contractual claim, asserting that the plaintiffs detrimentally relied on the defendants' promises to abide by the Fragmentation Policy. In Count IV, the plaintiffs allege that the defendants intentionally and tortiously interfered with the plaintiffs' prospective employment relationships with airlines which would otherwise have hired them. Counts V and VI are not relevant to the present motion.[1] The defendants have moved to dismiss Counts II, III, and IV of the Complaint on the ground that these common law state claims are preempted by the federally established duty of fair representation.

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[1] Count V alleges that the individual defendants violated the statutory fiduciary duties imposed by 29 U.S.C. § 501. Count VI seeks an injunction terminating the custodianship ALPA established over the Eastern MEC and its subordinate bodies.

Analysis

Section 2(a) of the Railway Labor Act ("RLA") grants a duly elected union the exclusive authority to represent all employees in a collective bargaining unit. 45 U.S.C. § 152, Second. The federal courts have long held that the grant of this exclusive right implicitly imposes a corresponding duty on a bargaining representative. Thus, it is undisputed between the parties that " 'as the exclusive bargaining representative of the employees, . . . the Union had a statutory duty fairly to represent all of those employees . . . .' " *United Steelworkers of America v. Rawson,* 110 S. Ct. 1904, 1911 (1990) (*quoting Vaca v. Sipes,* 386 U.S. 171, 177 (1967)). Under the duty of fair representation doctrine, ALPA's " 'statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, and to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.' " *Id.* The Supreme Court has been careful to note, however, that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, International v. O'Neill,* 111 S. Ct. 1127, 1135 (1991). As a result, the Court has stated that "a breach [of the duty of fair representation] occurs 'only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.' " *Rawson,* 110 S. Ct. at 1911 (*quoting Vaca,* 386 U.S. at 190.

ALPA acknowledges that its conduct toward the plaintiffs in this case is subject to the duty of fair representation. While ALPA will presumably argue that its actions did not violate the standard imposed by the duty of fair representation, ALPA does not contest that the plaintiffs have alleged sufficient facts in Count I of their

Complaint to state a claim that ALPA has violated the duty. Instead, in the present motion, ALPA takes the position that the duty of fair representation defines the sole duty owed by the Union to the plaintiffs. ALPA contends that the federal duty of fair representation preempts any other duties that might otherwise be imposed on the Union by the operation of state law.

The issue of preemption of state law causes of action by the duty of fair representation has been treated extensively by the federal courts.[2] Despite the large body of law on this topic, or perhaps because of it, no universal standard has been established to govern the applicability of preemption. The status of the caselaw is particularly confusing because the courts have tended to blur two distinct concepts in their discussion of preemption. On the one hand, preemption operates to preserve the exclusive jurisdiction of the administrative agency charged with implementing the relevant statute (the National Labor Relations Board ("NLRB") with respect to the NLRA and, to a lesser extent, the National Mediation Board ("NMB")

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[2] A significant factor leading to the proliferation of decisions on this issue is the fact that an analogous duty of fair representation has been implied under Section 9(a) of the National Labor Relations Act ("NLRA"). *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). Generally, RLA preemption of wrongful discharge claims is given wider scope than similar preemption under the NLRA. *See, e.g., Peterson v. Air Line Pilots Ass'n, International*, 759 F.2d 1161, 1169 (4th Cir.) ("The scheme of remedies and procedures carefully crafted in the RLA has long been interpreted as evidence of congressional intent significantly to limit an aggrieved employee's right to resort to state law as an alternative remedy for a wrongful discharge. . . . Unlike preemption under the NLRA, the preemption of state law claims under the RLA has been more complete."), *cert. denied*, 474 U.S. 946 (1985). Because the instant case does not involve wrongful discharge, it does not implicate the "carefully crafted" remedies of the RLA. As a result, the complex arbitral process established by the RLA was not invoked in this case, and therefore, in the present context, preemption need be accorded no greater scope than warranted by the general principles of preemption, as developed in both the NLRA and the RLA cases.

with respect to the RLA). *See, e.g., Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274, 288 (1971) (finding preemption, in part, because "when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body . . . ."). Preemption in this context is akin to the doctrine of primary jurisdiction.

A conceptually distinct situation arises where, as here, proper jurisdiction in federal court is undisputed, and the central issue is whether federal law preempts the substantive rights created by state law. The rationale advanced for preemption in the jurisdictional context is not automatically relevant when considering the preemption of substantive state law. Moreover, because the NLRB has jurisdiction over a much broader range of disputes than does the NMB, conclusions reached in the NLRA cases are not always instructive in the RLA context.

It is true that relevant principles of preemption may be gleaned from cases dealing with the exclusive jurisdiction of the NLRB. *See Peterson,* 759 F.2d at 1169 ("[W]e refer to [cases dealing with the exclusive jurisdiction of the NLRB] since we believe the risk of state interference with the effective administration of national labor policy is present here even though the exclusive jurisdiction of the arbitrator is not at issue.").[3] Nevertheless, "care must be

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[3] Read literally, this passage from *Peterson* appears to beg the critical question. Whether or not a particular state law interferes with the maintenance of an effective national policy is the essential inquiry of preemption analysis. *Peterson* begins its analysis by assuming that such concerns are implicated, in order to justify application of the NLRA cases. Not surprisingly, after starting from this assumption, the *Peter-*

taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 n.19 (1969).

Clearly, under both the RLA and the NLRA, the duty of fair representation has some preemptive effect on substantive state law. *See, e.g., Vaca,* 386 U.S. at 177 (complaint based on the duty of fair representation "alleged a breach by the Union of a duty grounded in federal statutes, and . . . federal law therefore governs [the] cause of action."); *Peterson,* 759 F.2d at 1170 ("The importance of the federal interest is such that the duty of fair representation cause of action is governed exclusively by federal law even when the claim is filed in state court."). The difficult question posed by this case is whether the federal duty of fair representation defines the *sole* duty owed by a union to its members, or whether state law can impose other duties supplemental to the duty of fair representation and not preempted by it. Specifically, in this case, plaintiffs argue that the state common law of contract prohibited ALPA from making explicit enforceable promises to its members[4] and then reneging on those promises, even if such conduct was not sufficiently "arbitrary, discriminatory, or in bad faith" to satisfy the federal standard for breach of the duty of fair representation. Similarly, the plaintiffs contend that ALPA should be held liable under state doctrine of tortious interference with a prospective business relationship, for interfering with plaintiffs' efforts to acquire jobs with enhanced seniority,

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son decision ultimately holds that preemption is warranted. Despite this apparent weakness in the court's reasoning, there can be no dispute that principles of preemption developed in the jurisdictional context can have applicability to the determination of federal preemption of substantive state law.

[4] The Fragmentation Policy, according to plaintiffs, constituted such an enforceable promise.

even if such conduct was not sufficiently "arbitrary, discriminatory, or in bad faith" to be a breach of the federal duty.

There is language in the relevant cases supportive of the plaintiffs' position. In *Rawson*, the Supreme Court stated, "We have never held, however, that as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to the employees by contract." 110 S. Ct. at 1911. In *Rawson*, the plaintiffs, survivors of the employees, argued that the union had contractually assumed greater duties to the employees, under the terms of the collective bargaining agreement, than otherwise required by the duty of fair representation. The Court, acknowledging that such enhanced duties were possible, held that the collective bargaining agreement, negotiated between the union and the employer, did not create rights directly enforceable by the individual employees against the union. *Id.* at 1912. The Court also held that the plaintiffs' state claims were preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), which requires that federal law be applied to legal actions requiring interpretation of a collective bargaining agreement. *Id.* at 1909-11.

Plaintiffs in the instant case argue that *Rawson*, by negative implication, supports their position that the Fragmentation Policy is a promise enforceable against ALPA through a state law action for breach of contract or detrimental reliance. The crux of plaintiff's argument is that the Fragmentation Policy, unlike the alleged promises in *Rawson*, was a promise made by the Union directly to the employees, rather than an agreement between the Union and the employer with only incidental benefit to the employees. Thus, if the plaintiffs' allegations are taken as true, the Fragmentation Policy would be enforceable directly by the employees, rather than by the Union, as in *Rawson*. Similarly, the preemption analysis in *Rawson* would not be applicable. The alleged contractual duties in

the present case do not flow from the collective bargaining agreement and, thus, could not be preempted by § 301 of the LMRA. Even more fundamentally, § 301 is not applicable to industries subject to the RLA, and there is no analogous provision under the RLA statutory framework. Thus, there can be no preemption on the *Rawson* theory.

Also arguably supportive of the plaintiff's position is *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 851 (1987). In *Hechler* the Court held that, while the employer was the party primarily responsible for ensuring a safe work place, "[a]nother party, *such as a labor union*, . . . may assume a responsibility towards employees by accepting a duty of care through a contractual arrangement." *Id.* at 860 (emphasis added). The *Hechler* Court followed this statement by noting, "If a party breaches a contractual duty, the settled rule under [state] law is that the aggrieved party may bring either an action for breach of contract or a tort action for injuries suffered as a result of the contractual breach." *Id.* The state claims in *Hechler* were ultimately found to be preempted, as in *Rawson*, by § 301 of the LMRA because the alleged contractually assumed duties were premised on, and required interpretation of, a collective bargaining agreement. The *Hechler* Court specifically mentioned that it was not presented with the question of whether "the Union possibly was subject to an independent state-law duty of care, unconnected to the collective-bargaining agreement . . . [which] could survive the pre-emptive power of federal labor law." *Id.* at 862 n.5.

Finally, plaintiffs cite to the case most factually similar to the instant case: *Richardson v. United Steelworkers of America*, 864 F.2d 1162 (5th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990). In that case, employees sued their union for failure to warn them, prior to their strike, that their employer had a statutory right to replace them. Plaintiffs there attempted to base their claim on the Texas common law of tort, because the six-month statute of limitations

applicable to a federal duty of fair representation action would have been fatal to a federal claim. The attempt failed as the court ruled that the state claims were preempted by the federal duty of fair representation. Significantly, however, the *Richardson* court, noting the *Hechler* language referring to the possibility of " 'an independent state-law duty of care,' " carefully circumscribed its holding, pointing out that the "plaintiffs did not allege any breach of a state tort duty that exists independently of the NLRA-established collective bargaining relationship . . . ." *Id.* at 1167.

In sum, while no court has ever found that a union has contractually obligated itself to duties above and beyond the duty of fair representation, the relevant precedent has strongly implied that, under the proper set of circumstances, a union could so obligate itself, and that it could be sued under state law for breach of those obligations. Assuming, *arguendo,* that a union may voluntarily assume some duties in excess of the duty of fair representation, the question remains whether the duties alleged by plaintiffs in this case are of the sort for which a union should be held responsible, under state law, for breach.

The duties plaintiffs allege that the Union owed to them in Counts II, III, and IV, all involve the obligation to negotiate (or to avoid interference with negotiations) between the plaintiffs and the carriers that acquired Eastern's assets. In essence, the claim in each of these counts is that the plaintiffs were not fairly represented by the Union. From this, preemption follows for it seems apparent that even though it is possible for a union to assume duties in excess of the duty of fair representation, such duties cannot be mere refinements of what constitutes the duty of fair representation. In other words, the additional duties cannot define bargaining positions the union must take or parties with whom the union must negotiate in its representational capacity for the union members. Duties of this nature would conflict with, rather than supplement,

the federal duty of fair representation. *See Vaca*, 386 U.S. at 180 ("the decision to preempt . . . must depend on the nature of the particular interests being asserted and the effect upon the administration of national labor policy"); *c.f., Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 296-97 (1977) (preemption not necessary " 'where the particular rule of law sought to be invoked . . . is so structured and administered that, in virtually all instances, it is safe to presume that [implementation] will not disserve the interests promoted by the federal labor statutes.' " (*quoting Lockridge*, 403 U.S. at 297-98 (1971))).[5] The supplemental duties contemplated by *Rawson* and *Hechler* had nothing to do with additional representational functions undertaken by the unions. Instead, those cases dealt with obligations, assumed by the respective unions, to inspect work environments for unsafe conditions. Those duties are sufficiently separate and distinct from the duty of fair representation so as not to conflict or interfere with implementation of that doctrine. The same cannot be said for the duties that plaintiffs would impose on ALPA in the present case. Because the duties urged by the plaintiffs infringe on an area that "can hardly be called a peripheral concern to federal labor law," *Peterson*, 759 F.2d at 1169, the Court finds that the plaintiffs' state law claims must be preempted.[6]

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[5] The quoted statements in *Vaca* and *Farmer* were both made with respect to preemption of a judicial remedy by the exclusive jurisdiction of the NLRB. As noted above, preemption on jurisdictional grounds is a distinct concept from federal preemption of substantive state law, and the legal rationale from the jurisdictional cases may or may not have applicability in the substantive law context. In this case, the principles of preemption are stated with such generality that it is difficult to discern any reason why the statements should not also apply to the preemption of state substantive law.

[6] Note, however, that presumption of the state law claims does not mean that the conduct forming the basis of those claims is irrelevant to the alleged breach of the federal duty of fair representation. To the contrary, evidence that ALPA (1) failed to honor a pre-existing ne-

For the foregoing reasons, the Court grants the defendants' motion to dismiss Counts II, III, and IV of the plaintiffs' First Amended Complaint.

An appropriate order will issue.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
November 3, 1992

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gotiation policy, (2) made promises to the plaintiffs, inducing the plaintiffs to strike, and then reneged on those promises, or (3) interfered with the plaintiffs' efforts to gain employment with other carriers, might well be relevant to whether ALPA's actions with respect to plaintiffs were "arbitrary, discriminatory or in bad faith." *Rawson*, 110 S. Ct. at 1911 (internal quotation omitted).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil No. 92-771-A

RICHARD B. NELLIS, *et al.*,

Plaintiffs,

v.

AIR LINE PILOTS ASSOCIATION, *et al.*,

Defendants.

ORDER

This matter comes before the court on defendants' motion to dismiss Counts II, III, and IV of the First Amended Complaint.

For the reasons stated in the accompanying memorandum opinion, defendant's motion is GRANTED.

The Clerk is directed to send copies of this Order to all counsel of record.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, Virginia
November 3, 1992

Supreme Court, U.S.
FILED
JUN 14 1994
OFFICE OF THE CLERK

No. 93-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RICHARD B. NELLIS *et al.*,

Petitioners,

—v.—

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-1686

RICHARD B. NELLIS ET AL.,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

This case concerns an internal union dispute between petitioners, former local union officials and pilot leaders of a 1989 strike at Eastern Air Lines, Inc. ("Eastern"), and respondent Air Line Pilots Association, International ("ALPA"), their national union, over ALPA's efforts to accommodate the competing interests of the various pilot groups ALPA represents in collective bargaining.

Eastern sold assets to four ALPA-represented airlines during and after petitioners' 1989 strike. Pursuant to an internal union policy, ALPA requested those airlines to hire Eastern pilots with special pay rates and lateral seniority rights (at the expense of the pilots employed at those airlines) and directed the ALPA councils at those airlines to consider reopening pilot collective bargaining agreements in support of ALPA's request. When the managements of those airlines refused to hire petitioners with lateral seniority, ALPA deter-

mined not to direct other ALPA pilot groups to engage in illegal job actions or offer wage concessions in an attempt to force their airlines to hire Eastern pilots with special pay and seniority rights. Petitioners now claim that ALPA somehow "promised" Eastern pilots jobs with seniority at other airlines at any cost and that federal or state law *required* ALPA to sacrifice the interests of other ALPA pilot groups and jeopardize the entire union for their benefit.

This Court has long held that federal labor law charges the union – not the federal courts – with the task of reconciling the conflicting interests of the employees it represents in collective bargaining. The district court in this case thus determined that petitioners failed to establish that ALPA violated its duty of fair representation under the Railway Labor Act, 45 U.S.C. §151, *et seq.*, under the standard recently reaffirmed in *Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 499 U.S. 65 (1991), and that petitioners could not circumvent the federal fair representation doctrine by challenging ALPA's collective bargaining conduct under state law. The district court also found no evidence that ALPA made (or broke) any "promises" to petitioners or failed to follow any union policy. The United States Court of Appeals for the Fourth Circuit affirmed but issued no independent appellate opinion.

We show below that the district court's opinions in this case raise no issue concerning the administration of the duty of fair representation, are fully consistent with a uniform body of preemption case law among the lower courts, and present no question that warrants plenary review by this Court.

COUNTERSTATEMENT OF THE CASE

Statement of Facts

1. Defendant ALPA is a unitary, national labor organization that represents airline pilots at over thirty airlines. ALPA national acts as an umbrella organization that supports

ALPA Master Executive Councils ("MECs") at each ALPA airline; the MECs, in turn, function as the ALPA coordinating councils responsible for representing pilots at each airline. Petitioners are former Eastern MEC officials and pilots who led the Eastern MEC's strike effort in 1989. (App. 7a).

Petitioners' claims center on an internal ALPA collective bargaining policy known as "Fragmentation Policy" that addresses the conflicting interests of pilot groups within ALPA when one ALPA carrier (the "Acquiring Airline") acquires substantial airline operations from another (the "Donor Airline") without hiring pilots from the Donor Airline. The policy outlines "appropriate [ALPA] actions necessary to protect the affected pilots," including (1) requests to the Acquiring Airline and appropriate government agencies to provide for the employment of pilots from the Donor Airline, (2) enforcement of existing contract provisions that would require the Acquiring Airlines to hire Donor Airline pilots with lateral seniority, and (3) assistance to affected MEC's in considering formal contract negotiations under Section 6 of the RLA, 45 U.S.C. §156, to request the employment of Donor Airline pilots with lateral seniority. (App. 9a-11a). ALPA maintains this policy as a procedural framework that allows MECs to advocate the interests of their pilot groups within ALPA and that guides ALPA in its effort to accommodate those competing pilot interests in collective bargaining.

As the district court explained, the policy is thus entirely dependent on the willingness of Acquiring Airlines to hire pilots with lateral seniority, requires internal ALPA negotiations between the affected ALPA MECs, and preserves ALPA's discretion to make the final determination concerning "appropriate" ALPA collective bargaining conduct to seek the lateral transfer of pilots from one ALPA airline to another. (App. 10a-11a). Contrary to the Petition (Pet. 14), moreover, the policy is *not* contained in ALPA's Constitution and By-

Laws or any contract (J.A. 738-39)[1] and is explicitly subject to interpretation, clarification or amendment at any time by ALPA's governing bodies. (App. 27a & n.10). The policy has never been applied to force an airline to employ pilots with lateral seniority.

2. In early March of 1989, without considering Fragmentation Policy, petitioners and the Eastern MEC voted to commence a pilot sympathy strike at Eastern. Although the strike enjoyed substantial initial success,[2] Eastern eventually hired sufficient permanent replacements to continue operations, and the Eastern MEC abandoned the strike in November 1989. Eastern had only recalled a few striking Eastern pilots by the time it terminated operations in January of 1991.

Following the disastrous end to their strike, petitioners began to complain that ALPA had "promised" all Eastern pilots that they would receive jobs with lateral seniority and pay raises under ALPA Fragmentation Policy at each ALPA carrier that acquired Eastern assets (and thus displace incumbent ALPA pilots at those airlines). Although the Petition repeats this rhetoric over and over, petitioners have only

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[1]Citations to "J.A. ___" are to the Joint Appendix on appeal before the Fourth Circuit.

[2]ALPA, the ALPA MECs and ALPA members at other carriers provided extraordinary support to Eastern pilots throughout the strike, including more than $106 million in strike benefits and other financial support largely financed by assessments on individual ALPA pilots. (J.A. 279-80, 846-47). As a substantial part of its efforts under Fragmentation Policy, ALPA also adopted a highly successful first-right-of-hire program that secured jobs for over 1000 Eastern pilots at other ALPA carriers. (App. 40a; J.A. 1086-1014). Those new-hire jobs provided former Eastern pilots with job security and salaries far in excess of their salaries at Eastern.

identified eight statements out of more than a thousand ALPA strike communications in 1989 that even mention Fragmentation Policy. (App. 12a-13a) (listing the statements). As the district court explained, these statements merely "indicate[]" that the procedural framework of ALPA Fragmentation Policy would apply "to the situation at Eastern" (App. 42a & n.15) and do not remotely "promise" wage increases and lifetime job security for striking Eastern pilots through jobs with lateral seniority at other airlines. To the contrary, each statement expressly cautions that the policy was "subject to negotiation between Eastern pilots and the pilots and management of an acquiring carrier" or refers to the policy itself which is entirely dependent on the willingness of Acquiring Airlines to hire pilots with lateral seniority. (App. 12a-13a).

3. The district court also found that ALPA fully complied with Fragmentation Policy in connection with each sale of Eastern assets to other ALPA carriers. (App. 36a, 41a).

In 1989 and 1991, Eastern transferred aircraft to Pan American World Airways, Inc. ("Pan Am"), Midway Airlines, Inc. ("Midway"), Delta Air Lines, Inc. ("Delta"), and two short routes to USAir, Inc. ("USAir") without requiring any airline to employ Eastern pilots with lateral seniority. (App. 8a-9a). In each instance, ALPA requested the Acquiring Airline to hire Eastern pilots with lateral seniority and convened internal union proceedings before ALPA's national governing bodies concerning the application of Fragmentation Policy. As contemplated by the policy, both the petitioners and the ALPA MECs at the Acquiring Airlines participated in those internal union proceedings as vigorous advocates for their own pilot groups. Many, but not all, of the affected ALPA MECs argued that Fragmentation Policy should not apply since the Eastern asset sales (as opposed to the strike) had not caused Eastern pilots to lose any jobs and had not increased pilot staffing needs at the Acquiring Airlines. (App.

15a-16a). In a series of internal proceedings over a two-year period, ALPA's governing bodies interpreted the requirements of ALPA's Fragmentation Policy[3] and directed the affected MECs to implement the policy as interpreted.

Both ALPA and the ALPA MECs, in turn, fully exhausted each of the three steps required under the policy. (App. 41a). At the national level, ALPA repeatedly requested the managements of Pan Am, Midway, Delta and USAir to hire Eastern pilots with lateral seniority. Each carrier refused, explaining that they had purchased Eastern assets without any obligation to hire pilots, that they did not need additional pilots to staff the acquired assets, and/or that they were not willing to bear the substantial costs of retraining Eastern pilots and adding expensive senior pilots to their payroll. (App. 14a-16a). The ALPA MECs also reported that their respective collective bargaining agreements did not require management to accept the lateral transfer of Eastern pilots and that, after careful consideration, they had concluded that re-opening their contracts to seek lateral transfer through Section 6 negotiations would be futile, would require their pilot groups to take a substantial wage cut to alter management's refusal to hire

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[3]In December of 1989, after considering the views of the Eastern MEC and all other ALPA pilot groups, ALPA's governing bodies interpreted the operative paragraph of the policy (App. 9a-10a) to require ALPA and/or the relevant MECs to take three actions: (1) to request Acquiring Airlines to hire Eastern pilots with lateral seniority, (2) to enforce any contract provisions requiring the Acquiring Airlines to do so, and (3) to *consider* re-opening their contracts through formal Section 6 negotiations under the RLA to seek pilot transfer. This interpretation also confirmed that ALPA maintained discretion to take further actions once these steps were exhausted. (App. 10a-11a). Contrary to the Petition (Pet. 5), the district court found that ALPA acted properly and reasonably in issuing this interpretation of its own union policy. (App. 38a).

petitioners, and could place their own pilots at risk of a strike or carrier self-help. (J.A. 683-86, 1755-59).[4]

In response, petitioners demanded that ALPA disregard the interests of ALPA pilots employed at the Acquiring Airlines and direct the other MECs to take actions beyond the requirements of Fragmentation Policy – such as offering pay cuts or engaging in slowdowns, sickouts, intermittent strikes, or other self-help tactics – to disrupt operations at all airlines acquiring Eastern assets until they agreed to hire Eastern pilots with lateral seniority. (App. 39a). Following further proceedings involving the full participation of the Eastern pilots, ALPA's governing bodies determined that ALPA and the MECs had complied with union policy and, after weighing the costs and benefits to all affected pilot groups, declined petitioners' request to order other ALPA pilot groups to risk discipline or discharge by engaging in union pressure tactics or to offer wage cuts in a likely futile effort to force their airlines to hire petitioners with lateral seniority. (App. 21a, 39a).

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[4]Contrary to the Petition (Pet. 2, 4-5), the district court found no evidence that *ALPA* (as opposed to individual pilots at other airlines) "objected" to the transfer of Eastern's pilots with lateral seniority at other carriers. (App. 24a n.9). For example, petitioners have simply made up their claim that Delta and the Delta MEC reached a "private agreement" to refuse to hire Eastern pilots. (Pet. 5). While a Delta official learned that the Delta MEC opposed the application of Fragmentation Policy in *internal* ALPA proceedings, the official testified without contradiction that he knew that such statements did not reflect *ALPA's* position, that he later learned that ALPA had rejected the Delta MEC's position, and that any statements by Delta MEC officers played no role whatsoever in Delta's refusal to hire *any* Eastern pilots under *any* circumstances. Pan Am's initial interest in hiring Eastern pilots (Pet. 4) was likewise based on impossible conditions and was withdrawn while ALPA conducted internal union proceedings pursuant to the policy.

Course of Proceedings

Petitioners allege that ALPA breached its duty of fair representation under the RLA by failing to "implement" Fragmentation Policy to secure jobs with lateral seniority for Eastern pilots at Pan Am, Midway, Delta and USAir through collective bargaining and that ALPA's collective bargaining conduct during and after the Eastern strike violated a variety of state law contract and tort obligations.

In a pretrial ruling, the district court held that petitioners could not circumvent the limited federal duty of fair representation doctrine or force ALPA to disregard the interests of other ALPA pilot groups by challenging ALPA's collective bargaining decisions under state law. (App. 59a). In doing so, the district court followed a uniform body of lower court cases holding that the federal duty of fair representation preempts state law challenges to a union's collective bargaining conduct and carefully distinguished this Court's decision in *United Steelworkers of Am.* v. *Rawson*, 495 U.S. 362 (1990), which did not involve the relationship of *state law* to the federal duty of fair representation and did not involve a challenge to a union's negotiating judgment. (App. 56a-57a).

At the close of discovery, the district court held that ALPA's collective bargaining conduct in this dispute was not arbitrary, discriminatory or undertaken in bad faith under the tripartite duty of fair representation standard recently reaffirmed in *O'Neill*. In particular, the district court held that ALPA's collective bargaining decisions were not "arbitrary" since they were based on a rational consideration of the competing interests of various ALPA pilot groups and a considered interpretation of union policies (App. 21a-22a); that ALPA did not "discriminate" against the petitioners in exhausting Fragmentation Policy simply because the result of ALPA's bargaining decisions may have been to favor the interests of other ALPA pilots over those of petitioners (App.

41a-42a); and that the substantial discovery record compiled below contained no evidence that ALPA had engaged in any "bad faith" – *i.e.*, deceitful or dishonest – conduct in making statements concerning Fragmentation Policy or in interpreting or applying the policy following the strike. (App. 22a-24a).

On appeal, the Fourth Circuit affirmed both decisions "for the reasons set forth by the district court" (App. 5a), but it issued no appellate opinion concerning either the application of the *O'Neill* standard to this case or the preemption of state law claims by the RLA's duty of fair representation.

ARGUMENT

The petition offers two principal reasons for granting plenary review of these intensely fact-bound decisions: (1) that the district court's opinion creates a "conflict" with this Court and other Circuits concerning the application of the duty of fair representation doctrine (Pet. 14-20), and (2) that the district court improperly dismissed petitioners' state law claims (Pet. 9-13). In fact, the decisions below constitute routine applications of federal labor law principles and are fully consistent with the uniform application of the duty of fair representation doctrine by this Court and the lower courts.

I. THE DISTRICT COURT'S FAIR REPRESENTATION DECISION APPLIES THE PROPER LEGAL STANDARD AND CREATES NO CIRCUIT CONFLICT

The system of collective bargaining created by the federal labor statutes requires unions to pursue *collective* interests in labor contracts that often benefit one employee group at the expense of another. *See Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 337-38 (1953). As "a purposefully limited check" on this legislative enterprise, *see Rawson*, 495 U.S. at 374, this Court has crafted the duty of fair representation to prohibit a union from engaging in arbitrary, discriminatory or bad faith conduct in its role as collective bargaining represen-

tative. *See Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 349 (1964). In *O'Neill*, the Court recently clarified that this tripartite standard "applies to all union activities, including contract negotiation," *O'Neill*, 499 U.S. at 67, but cautioned that "[a]ny substantive examination of a union's performance . . . must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities," *id.* at 78.

The district court plainly applied this fair representation standard to the record below and made specific determinations with respect to each element of the tripartite *O'Neill* standard. (App. 21a-22a (arbitrary); 27a, 36a-42a (discrimination); 22a-24a (bad faith)). In doing so, moreover, the court neither ignored *O'Neill* to "follow" the Seventh Circuit's 1992 decision in *Rakestraw* v. *United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 175 (1993),[5] nor adopted any "majority rule" defense to discrimination claims in a fair representation action. (Pet. 14-15).

Although petitioners received nationwide pilot support to mount their strike and nearly 1000 pilot jobs at other carriers through ALPA's efforts, *see supra* n.2, they now fault ALPA for considering and, they say, favoring the interests of other ALPA pilot groups in declining to require other MECs to engage in concessionary collective bargaining or self-help tactics to pursue the lateral transfer of Eastern pilots. Once the Acquiring Airlines refused ALPA's requests under Fragmentation Policy, however, ALPA determined that such conduct would put ALPA pilots at risk of discipline or discharge or require other pilots to sacrifice pay and working

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[5]The Petition fails to disclose that this Court denied the petition for certiorari in the *Rakestraw* case. *See* 114 S.Ct. 175 (1993).

conditions in a likely futile effort to force the Acquiring Airlines to hire petitioners with lateral seniority and premium pay. The district court found that ALPA did not depart from ALPA policy in reaching this decision (App. 41a-42a), and it is undisputed that ALPA has never treated any other pilot group differently under Fragmentation Policy.

Under these circumstances, the district court held that ALPA rationally and properly accommodated the competing interests of ALPA pilot groups and did not unlawfully "discriminate" against petitioners simply because the *result* of ALPA's collective bargaining judgment was to favor the legitimate interests of other ALPA pilots over those of the petitioners. (App. 41a-42a).

This holding is firmly rooted in the fair representation decisions of this Court and every lower court to address the issue. "Conflict between employees represented by the same union is a recurring fact," and federal collective bargaining law *requires* unions to accommodate the often sharply competing interests of the various subgroups of employees the union represents. *See Humphrey*, 375 U.S. at 349-50; *Huffman*, 345 U.S. at 337-38. In matters such as this one involving competing job rights or competing claims to compensation, for example, *every* union decision will benefit one group of employees directly at the expense of another, and *every* such decision will create a dissatisfied group. *See Huffman*, 345 U.S. at 338-39. Because labor unions must broker these conflicting interests through the exercise of essentially legislative judgment, *see Steele* v. *Louisville & N.R.R.*, 323 U.S. 192, 202 (1944), unions are entitled to exercise a "wide range of reasonableness" in making such judgments, and collective bargaining decisions are accorded the broad judicial deference accorded legislatures, *see O'Neill*, 499 U.S. at 76; *Humphrey*, 375 U.S. at 349-50.

As a result, even if a union might violate its duty of fair representation by sacrificing "minority interests *solely* to benefit the majority" (Pet. 16) (emphasis added), the Circuits have uniformly held that a union does not unlawfully "discriminate" where, as here, its decision to favor the interests of a majority employee group in resolving competing seniority claims is based on rational and legitimate unions concerns (or the reasonable implementation of union policy). *See Adcox* v. *Teldyne, Inc.*, 1994 U.S.App. Lexis 7811 *18 (6th Cir. 1994) (union absolved of liability because it "followed its rules"); *Chaparro-Febus* v. *International Longshoremen's Ass'n*, 983 F.2d 325, 330-31 (1st Cir. 1992) (upholding a union decision favoring the interests of a majority group in reconciling competing seniority claims); *Rakestraw*, 981 F.2d at 1533 ("[a]dhering to [ALPA] policy insulates the union against . . . the duty of fair representation"); *id.* at 1530-31 (explaining that all union decisions have winners and losers and that a union does not discriminate simply by favoring the majority); *Mock* v. *T.G.&Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992) ("[s]imply showing that the Union did not represent [plaintiffs] as vigorously as it could have does not establish" a breach of the duty of fair representation); *Allen* v. *United Transp. Union*, 964 F.2d 818, 820 (8th Cir. 1992) ("it is not enough to show the [contract] adversely affected the appellants compared to other employees"); *O'Neill* v. *Air Line Pilots Ass'n, Int'l*, 939 F.2d 1199, 1201-07 (5th Cir. 1991) (dismissing all remaining claims on remand from this Court); *Ackley* v. *Local Union 337, Int'l Bhd. of Teamsters*, 910 F.2d 1295, 1308 (6th Cir. 1990) (explaining that unions would be driven "out of existence" if the duty of fair representation precluded union decisions that favored the interests of some employees over others) (dissenting opinion adopted on rehearing in light of *O'Neill*, *see* 948 F.2d 267 (6th Cir. 1991)); *Gvozdenovic* v. *United Air Lines, Inc.*, 933 F.2d 1100, 1106-07 (2d Cir.), *cert.*

denied, 112 S.Ct. 305 (1991).[6]

Given this consistent application of the fair representation doctrine in the lower courts, petitioners cannot plausibly assert that the district court's decision creates any "conflict" with the handful of pre-*O'Neill* decisions from the First, Second, Seventh and Ninth Circuits cited in the Petition. (Pet. 16-18). In *Bernard* v. *Air Line Pilots Ass'n, Int'l*, 873 F.2d 213 (9th Cir. 1989), and *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974), the union barred a minority employee faction from *any* participation in internal union seniority integration proceedings and established seniority rights *solely* on the basis of union membership. Here, the Eastern MEC and its lawyers enjoyed full participation in all internal Fragmentation Policy proceedings before ALPA's governing bodies. (App. 36a-42a). *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793 (7th Cir. 1976), suggests that seniority adjustments "may not be made *solely* for the benefit of a stronger, more politically favored group over a minority group," *id.* at 798-99, but plainly held that a union is "absolved of liability" under the duty of fair representation where, as here, it can "show some objective justification for its conduct," *id.* at 800; *see Rakestraw*, 981 F.2d at 1535 (distinguishing *Barton*

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[6]Instead, a union engages in unlawful "discrimination" if it distinguishes between employee groups or intentionally harms a protected class for "invidious" reasons such as race or internal union politics that are unrelated to any legitimate union objective under federal labor law. *See Steele*, 323 U.S. at 203 (race); *Carter* v. *United Food & Commercial Workers*, 963 F.2d 1078, 1081 (8th Cir. 1992) (gender); *NLRB* v. *International Longshoremen's Ass'n, Local No. 1581*, 489 F.2d 635, 636 (5th Cir.) (national origin), *cert. denied*, 419 U.S. 1040 (1974); *Jones* v. *Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974) (union membership); *Barton Brands, Ltd.* v. *NLRB*, 529 F.2d 793, 800 (7th Cir. 1976) (political favoritism).

Brands in the Seventh Circuit). None of these cases remotely stands for the proposition that a union violates the duty every time it favors the majority employee interests in collective bargaining. *Cf. Humphrey*, 375 U.S. at 349 (upholding a union's decision to favor the majority over the minority in determining seniority rights).[7]

The district court's unremarkable application of *O'Neill* and its progeny thus creates no conflict among the Circuits and provides no basis for this Court's review.

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[7]Even further afield is petitioners' passing claim that ALPA engaged in "arbitrary" or "bad faith" conduct. (Pet. 18-19 n.7). First, as the district court explained (App. 21a-22a), ALPA's judgment not to sacrifice the pay and working conditions of other pilot groups for petitioners' benefit was plainly *not* "so far outside a 'wide range of reasonableness' that it is 'wholly irrational.'" *O'Neill*, 499 U.S. at 78 (quoting *Huffman*, 345 U.S. at 338). Second, a showing of bad faith under the duty of fair representation requires "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey*, 375 U.S. at 348; *see also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299-301 (1971). The district court thus properly required proof that ALPA's statements concerning Fragmentation Policy during the strike were intentionally misleading (App. 22a-24a) (collecting cases) and concluded that "nothing in this record supports an inference that ALPA undertook a commitment to the Eastern pilots that it did not intend to honor." (App. 23a). The lower courts have consistently required such proof to challenge statements by union officials under the duty of fair representation, *see, e.g.*, *O'Neill*, 939 F.2d at 1202-03; *Swatts* v. *United Steelworkers of Am.*, 808 F.2d 1221, 1225 (7th Cir. 1986), and no court has ever held that strike statements by union officials are otherwise actionable.

II. THE DISTRICT COURT'S PREEMPTION DECISION PROPERLY CONSTRUES THE DUTY OF FAIR REPRESENTATION AND CREATES NO CIRCUIT CONFLICT

The preemption decision below is equally unexceptional.

A union's authority to engage in collective bargaining and its obligations to individual employees in collective bargaining are created and defined by federal law. *See Steele*, 323 U.S. at 199-204. When Congress granted unions the exclusive authority to represent railroad and airline employees pursuant to Section 2, Ninth of the RLA, 45 U.S.C. §152, Ninth, it imposed a corresponding "statutory duty" to represent employees fairly in collective bargaining. *See Steele*, 323 U.S. at 202-03; *Rawson*, 495 U.S. at 372. In developing this federal duty of fair representation, the Court has consistently rejected the application of state law to union collective bargaining conduct in favor of a uniform federal standard of conduct, a uniform federal six-month statute of limitations, and a uniform federal standard for assessing damages. *See Vaca*, 386 U.S. at 190-95; *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983); *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48-52 (1979).

Petitioners nonetheless claim that ALPA's collective bargaining conduct in this dispute – its statements concerning Fragmentation Policy, its internal bargaining policies and its subsequent implementation of its policies through collective bargaining – was governed by two independent and conflicting legal doctrines: the federal duty of fair representation (which provides a deferential standard of review, a six-month statute of limitations, and compensatory damages only) and the separate and conflicting common law obligations of several different states (which, according to the plaintiffs, provides a more intrusive legal standard, a longer statute of limitations and the availability of punitive damages). Even more, petitioners allege that ALPA's collective bargaining conduct

created state law "promises" or "contracts" that, in turn, *prohibited* ALPA from exercising its federal duty of fair representation to reconcile the competing interests of petitioners and other ALPA pilot groups in collective bargaining over seniority issues. (Pet. 13-14).

If adopted, this state law theory would permit employees to circumvent the substantive and procedural requirements of a federal duty of fair representation action by pleading every fair representation claim as a state law contract or tort action and would subject unions to a welter of conflicting state regulations whenever they conduct a strike or engage in collective bargaining.[8] So, too, state regulation of collective bargaining conduct at the behest of one employee group would prevent labor unions from satisfying their federal duty to consider the interests of *all* employee groups.

The lower courts have uniformly held that the federal duty of fair representation preempts such state law claims. Congress' intent to preempt state action may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose," *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), and preemption is proper if state law "conflicts with federal law or would frustrate the federal scheme," *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 748-49 (1985), or if "the courts discern from the totality of the circumstances that Congress sought to occupy

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[8]While the plaintiffs do not say which state law governs their contract and tort claims, the alleged strike "promises" concern statements made in Virginia, the District of Columbia, Florida and Georgia (among other states); the 2,400 class members received these ALPA communications throughout the country; and the alleged tortious interference and breach of contract occurred in New York (Pan Am), Illinois (Midway), Pennsylvania and Virginia (USAir), and Georgia (Delta).

the field to the exclusion of the States." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 209 (1985). This Court has long preempted the application of state law to a wide range of collective bargaining activity because Congress intended to subject such conduct to a uniform system of *federal* law. *See, e.g., id.* at 208-13; *Lockridge*, 403 U.S. at 292.

In order to preserve the uniformity and supremacy of the federal labor law, *every* lower court to address this issue has also held that the duty of fair representation preempts state law claims such as petitioners' and that employees cannot circumvent the "purposefully limited" duty of fair representation, *see Rawson*, 495 U.S. at 374, by challenging union collective bargaining conduct under state law. *See, e.g., In re Glass Workers, Local No. 173*, 983 F.2d 725, 728-29 (6th Cir. 1993) (preempting state law malpractice, fraud and tortious interference claims); *Richardson* v. *United Steelworkers of Am.*, 864 F.2d 1162, 1169-70 (5th Cir.) (preempting state law misrepresentation claims where, as here, employees allegedly relied to their detriment on union "promises" during a strike), *cert. denied*, 493 U.S. 803 (1989); *Johnson* v. *United Food & Commercial Workers*, 828 F.2d 961, 967 (3d Cir. 1987) (fraud claims); *Peterson* v. *Kennedy*, 771 F.2d 1244, 1259-60 (9th Cir. 1985) (negligence and malpractice claims), *cert. denied*, 475 U.S. 1122 (1986); *Peterson* v. *Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1171 (4th Cir.) (preempting a common law tortious interference claim because "the potential conflict between remedies and administration [of state and federal law] are too great to permit the state law claims to stand"), *cert. denied*, 474 U.S. 946 (1985); *Griffin* v. *Air Line Pilots Ass'n, Int'l*, 126 Lab. Cas. (CCH) ¶10,913 (N.D. Ill. 1993) (tortious interference claims); *Rakestraw* v. *United Airlines, Inc.*, 765 F.Supp. 474, 495-96 (N.D. Ill. 1991), *aff'd in rel. part*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 286 (1993); *Eisenberg* v. *Trans World Airlines, Inc.*, 654 F.Supp. 125, 128

(S.D. Fla. 1987), *aff'd*, 875 F.2d 872 (11th Cir. 1989); *Reiss* v. *Brotherhood of Ry. and Airline Clerks*, 629 F.Supp. 1029, 1030 (E.D. Pa. 1986).[9]

Instead, the lower courts have consistently held that the type of union collective bargaining conduct at issue in this case – strike statements and the accommodation of competing employee interests in collective bargaining – must be measured against a uniform *federal* duty of fair representation standard derived from federal labor policy. *See, e.g.*, *Richardson*, 864 F.2d at 1169-70; *Peterson*, 759 F.2d at 1170-71. While the Petition fails to disclose this line of lower court authority, petitioners do not (and cannot) cite a single case in which a court has permitted employees to challenge the results of union collective bargaining decisions under state contract or tort law.[10] The district court's refusal to do so here

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[9]Contrary to the Petition (Pet. 9-10), the lower courts have properly held that the duty of fair representation preempts inconsistent state law even though the duty itself is implied from Section 2, Ninth of the RLA. *See, e.g.*, *Allis-Chalmers*, 471 U.S. at 210-12 (holding that the implied federal right of action under 29 U.S.C. §185 preempts state law contract claims). Similarly, while preemption in this case does not involve the primary jurisdiction of an administrative agency (Pet. 13 n.4), the federal interest in a uniform federal labor policy identified in the primary jurisdiction cases is equally applicable here. *Cf. id.* at 211-12.

[10]The cases cited in the Petition (Pet. 11 n.3) principally involve *federal* claims under Section 301 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §185, to enforce explicit provisions in a formal union constitution. The RLA contains no counterpart to Section 301 of the NLRA, *see Baylis* v. *Marriot Corp.*, 843 F.2d 658, 644 (2d Cir. 1988); moreover, the ALPA bargaining policies and strike communications at issue in this case are *not* contained in ALPA's Constitution or any other contractual instrument.

creates no reviewable issue.

Nothing in *Rawson* or *International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851 (1987), is to the contrary. In both cases, the Court held that state common law claims against unions must be preempted to ensure that unions are subject to uniform standards of conduct derived from federal labor law and that the plaintiffs could proceed, if at all, only under Section 301 of the National Labor Relations Act, 29 U.S.C. § 185. *See Rawson*, 495 U.S. at 370-71. *Rawson* and *Hechler* thus concerned the relationship of two purely *federal* labor law claims: a federal duty of fair representation claim and a federal Section 301 claim to enforce a labor contract. *See id.*, 495 U.S. at 372. Neither case addressed the relationship between the federal duty of fair representation and state common law; neither considered the issues of supremacy and uniformity raised by petitioners' attempt to regulate ALPA's collective bargaining conduct under a series of conflicting state laws; and neither purported to overrule the lower court preemption cases described above. *See id.* at 384 (Kennedy, J., dissenting) (explaining that the duty of fair representation would preempt *state law* challenges to union conduct where, as here, the duty "address[es] the conduct in question").

As the district court explained, moreover, the contractual duty at issue in those cases – a duty to inspect the workplace for unsafe conditions assumed in a labor contract – is "sufficiently separate and distinct from the duty of fair representation so as not to interfere with implementation of that doctrine." (App. 59a). In this case, however, petitioners argue that ALPA must "honor" its "promises" to Eastern pilots by disregarding the interests of other pilot groups in collective bargaining with the carriers that acquired Eastern assets. These alleged state law duties thus pose a direct conflict with ALPA's federal duty to consider the interests of *all* pilot groups in negotiations with other carriers. (App. 58a-59a).

Nothing in *Rawson* indicates that the states can alter a union's duty of fair representation through such state law regulation or that a union changes the nature of its obligations simply by maintaining collective bargaining policies or by communicating collective bargaining goals to employees. *See id.* at 360-61; *Richardson*, 864 F.2d at 1167.[11]

In any event, review of the district court's preemption decision would serve no purpose in this litigation in light of the district court's summary judgment decision. Petitioners seek to litigate a state law breach of contract action against ALPA on theory that ALPA broke a "promise" to implement ALPA Fragmentation Policy to secure jobs with lateral seniority for Eastern pilots at other ALPA carriers. (Pet. 13-14). As the district court determined after reviewing the substantial record, however, the handful of ALPA strike communications cited by petitioners merely indicate that

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[11]In *Rawson* itself, moreover, the Court held that employees can assert contract claims against unions only if they can "point to language in the collective-bargaining agreement specifically indicating an intent to create obligations *enforceable against the union* by the individual employees." *Rawson*, 495 U.S. at 374 (emphasis added). Nothing in ALPA's policies or strike communications indicate that ALPA intended the Fragmentation Policy to grant Eastern pilots judicially enforceable rights against ALPA or to alter ALPA's duty of fair representation to other pilot groups. (App. 37a) (explaining that Fragmentation Policy "explicitly reserves" ALPA's discretion as collective bargaining representative in implementing the policy). So, too, no principle of law transforms a union's changing policies or statements concerning bargaining goals into immutable "contract" rights. *See Rakestraw*, 981 F.2d at 1536; *see also Clarke* v. *Laborers' Int'l Union*, 916 F.2d 1539, 1542 (11th Cir. 1990); *Air Wisconsin Pilots Protection Comm.* v. *Sanderson*, 909 F.2d 213, 218 (7th Cir. 1990), *cert. denied*, 498 U.S. 1085 (1991) (same).

ALPA would apply the procedural framework of Fragmentation Policy to the sale of Eastern assets, and that is precisely what ALPA did. (App. 42a). The district court also determined that ALPA reasonably interpreted and complied with ALPA Fragmentation Policy in all respects throughout this dispute. (App. 36a, 41a). This dispositive factual determination precludes any "breach of contract" claim against ALPA and does not raise any issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
JUL 15 1994
OFFICE OF THE CLERK

(3)

No. 93-1686

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RICHARD B. NELLIS, *et al.*,

Petitioners,

v.

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent argues in opposition to the petition that this "intensely fact-bound" case involves "routine applications of federal labor law" (Opp. Br. 9). Respondent is wrong on both counts. As the court below recognized, this case presents "a novel question regarding the scope of the preemptive effect of federal labor law" (App. 49a), and "novel questions concerning the scope of the federal duty of fair representation" (App. 6a). Respondent's statement of facts, moreover, ignores the principal factual conclusion reached by the lower court: "a reasonable jury could draw sufficient inferences from the factual record to accept plaintiffs' theory" that "ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots" because they had become "politically unpopular with the majority of the ALPA membership."(App. 35a-36a).[1] Respondent's effort to ignore this key conclusion of the court below cannot obscure the fact that this case presents important questions of labor law and policy about the proper scope of the judicially implied duty of fair representation and its impact on the normal range of state contract remedies that protect the citizens of each state from breach of promise. In the resolution of these questions, the lower court decisions conflict with Constitutional provisions, decisions of this Court, and decisions of other circuits.

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[1] Respondent's factual recitation distorts in numerous instances the facts and reasonable inferences from the factual record below. Its factual account is inconsistent with the procedural posture of the case—the allegations and factual record must be viewed in the light most favorable to petitioners on motions to dismiss or for summary judgment. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1954); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

I. THE DECISION BELOW IS NOT A ROUTINE APPLICATION OF SETTLED DUTY OF FAIR REPRESENTATION PRINCIPLES; IT CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

1a. Respondent errs in contending that this is simply a run of the mill case in which the union was required to accommodate "the competing interests" of different groups within the union and the courts uniformly hold that a union is entitled to wide deference (Opp. Br. 10-11). Respondent's formulation misses the key fact that, in this case, the union made the decision as to how these competing interests would be accommodated *in advance of* the transfers of Eastern assets,[2] and that the Eastern pilots relied on this decision, communicated to them by the union during the strike.

Contrary to Respondent's suggestion, Petitioners do not claim that ALPA breached its duty of fair representation simply because they do not like the *result* (Opp. Br. 11). Petitioners claim that the union cannot permissibly deny Petitioners promised seniority integration by improper means. Thus, ALPA was not entitled to ignore or amend or interpret out of existence its previous commitments on which the minority had relied. Likewise, ALPA was not permitted actively to negotiate with the managements of the acquiring carriers *against* the seniority integration it had committed itself to support.[3] The decisions cited by

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[2] ALPA is a unitary labor organization in which the Master Executive Councils ("MECs") that are elected by the pilots at each ALPA airline to protect their interests have no existence independent from ALPA (App. 7a). *See also, Crawford v. ALPA*, 992 F.2d 1295, 1298 (4th Cir. 1993) (*en banc*). The MECs for the acquiring carriers were represented on the ALPA Executive Board, which voted to promise striking Eastern pilots that Merger Policy would be applied to protect their lateral seniority in the event of a breakup of Eastern caused by the strike. As constituent parts of ALPA, the MECs and all union members are bound by the union's policies and the actions of its duly authorized officers (App. 7a).

[3] ALPA's claim that the "district court found no evidence that *ALPA* (as opposed to individual pilots at other airlines) 'objected' to the trans-

Respondent that give unions wide latitude to decide between competing union groups (Opp. Br. 11) all involve situations in which the union had made no prior commitment on the subject and had not subverted its own policies. They are, therefore, wholly inapposite.

Respondent also contends that the lower court properly concluded, out of "respect for the process of union democracy" (App. 27a) that ALPA did not unlawfully discriminate against Eastern pilots so long as it "complied with the literal terms of its Fragmentation Policy" as amended to reflect ALPA's eroding commitment to seniority integration for Eastern pilots (App. 41a).[4] Following

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fer with lateral seniority at other carriers" (Opp. Br. 7 n.4), mischaracterizes the district court decision, the structure of ALPA, and the factual record. The portion of the district court decision Respondent relies upon does not even discuss the evidence of interference with the managements of the acquiring carriers, but instead holds that statements by MEC officers (the "individual defendants") at internal ALPA proceedings were "not evidence of bad faith" (App. 24a n.9).

The evidence was clear that Pan Am MEC officers talked directly to Pan Am management and objected to management's public agreement to the lateral transfer of Eastern pilots in connection with Pan Am's acquisition of 14 Eastern B-727 aircraft in 1989 (App. 14a). Likewise, there was evidence that in 1989 the U.S. Air MEC objected vigorously to management's insistence on lateral transfer of Eastern pilots in connection with U.S. Air's planned acquisition of 15 Eastern B-757s (App. 14a-15a). And Captain Alger, a Delta Vice President, testified that he and the Delta MEC Chairman agreed that the Fragmentation Policy did not apply to Delta's acquisition of Eastern aircraft and routes in 1991 (App. 15a).

The MEC officers who objected to their management's support of lateral transfers were not merely "individual pilots" (Opp. Br. 7 n.4). Under ALPA's unitary organizational structure, see note 2, *supra*, they were officers of ALPA itself, who were bound by ALPA's commitment to lateral seniority transfer, and whose actions were the actions of ALPA. *See Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1394-97 (D.C. Cir.), *cert. denied*, 469 U.S. 1072 (1984); *North River Energy Corp. v. UMW*, 664 F.2d 1184, 1190 (11th Cir. 1981); *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 171-72 (9th Cir. 1980); *Barton Brands v. NLRB*, 529 F.2d 793, 797-98 (7th Cir. 1976).

[4] The lower court properly recognized that a union could not "disregard its policy . . . once the policy was established and [a minority

the "literal terms" of a policy that has been amended to eliminate an obligation upon which union members have relied cannot exonerate ALPA from liability for its breach of promise under the duty of fair representation. Nor does the following the literal language of the amended Policy justify ALPA's active opposition to management's support for lateral transfer.

1b. Respondent is wrong when it suggests that this Court's decision in *ALPA v. O'Neill*, 499 U.S. 65 (1991) has removed any conflict with the "handful of pre-*O'Neill* decisions" from other circuits cited by Petitioners (Opp. Br. 13). As Respondent concedes (Opp. Br. 10), *O'Neill* rejected ALPA's argument that its collective bargaining conduct was immune from all judicial review. It held further that an attack on the *results* (as opposed to the methods) of collective bargaining as "arbitrary"in violation of the duty of fair representation could only succeed if the results were "wholly irrational." 499 U.S. at 78. Contrary to Respondent's suggestion, *O'Neill* does not affect the holdings in *Bernard v. ALPA*, 873 F.2d 213, 217 (9th Cir. 1989), *Teamsters Local 42 v. NLRB*, 825 F.2d 608, 611 (1st Cir. 1987); *Barton Brands, Ltd. v. NLRB*, 529 F.2d 793, 798-799 (7th Cir. 1976); and *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974) that a union discriminates against the minority when it acts solely to benefit the union majority.

Respondent's halfhearted attempt to distinguish away the conflicts with these decisions from the First, Second,

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union group] stood ready to benefit from it" (App. 27a). It then approved ALPA's amendments to the Policy to evade its obligations after Eastern pilots had struck in reliance on the promise that the Policy would apply, acknowledging that "[p]laintiffs may understandably take little consolation from the Court's holding that while ALPA was not permitted to ignore the Fragmentation Policy to plaintiffs' detriment, ALPA was free to alter the Policy in such a way as potentially to deprive plaintiffs of the Policy's benefits" (App. 27a n. 10). This view of a union's duties to the minority provides no protection whatsoever from majority abuse whenever a union is sophisticated enough to document its breach of promise as a formal change of union policy.

Seventh and Ninth Circuits is unpersuasive. Respondent first contends, incorrectly, that, unlike here, in *Bernard* and *Jones* the union minority was excluded from participation in internal union proceedings leading to an adverse decision. In fact, these courts were concerned not with exclusion from internal union proceedings, but with the fact that the disadvantaged group, like the Eastern pilots here, was excluded from negotiations *with the employer*. *Bernard*, 873 F.2d at 216 ("no [new] pilot was permitted to participate in ALPA negotiations with [the employer] after the merger, despite requests to do so"); *Jones*, 495 F.2d at 794-95. The point of *Bernard* and *Jones* is that a union engages in unlawful discrimination when it refuses to negotiate for a new union group solely to benefit the existing union membership which constitutes the majority. The point of *Teamsters Local 42*, which Respondent makes no attempt to distinguish, is the same. 825 F.2d at 611 ("[u]nion members are to be accorded equal rights, not subjugated arbitrarily to the desires of a 'stronger, more politically favored group' "). These decisions conflict with the lower court decision here that it was permissible for the union to renege on its promises because honoring them "would be politically unpopular with the majority of the ALPA membership" (App. 35a.).

Respondent claims that *Barton Brands* is consistent with the lower court decision here because it permits sacrifice of minority interests where the union has shown "some objective justification for its conduct" (Opp. Br. 13). The lower court did not find that ALPA was "justified" in refusing to honor its commitment to lateral transfer for any reason other than the fact that the majority wished that result, and then pursued the proper formalities to achieve the result by amending union policies (App. 42a). *Barton Brands* explicitly limits union authority to prefer majority interests where, as here, the union minority has acted in reliance on a policy that would have protected their interests. *Barton Brands*, 529 F.2d at 800 (distinguishing cases approving seniority integrations on the ground that in those cases the disadvantaged group had

not acted "in reliance on" a promise later withdrawn by the union). *Barton Brands* is thus in direct conflict with the decision here that permits such conduct so long as it is accomplished through the empty formalism of amending the union policy, which the majority can always do.

This is not to say that there is no situation in which a union may permissibly prefer the union majority over the minority. Here, however, the lower court erred when it reasoned, following *Rakestraw v. United Airlines, Inc.*, 981 F.2d 1524 (7th Cir. 1992), *cert. denied*, 114 S.Ct. 175 (1993) and in conflict with the decisions of other circuits, that *the fact that the majority favored the sacrifice* of Eastern pilots' promised seniority rights was, *in itself*, sufficient justification for the union's conduct even where the conduct was part of a union campaign to "evade" its obligations to those pilots. This sanctification of majority rights eviscerates the protection afforded minorities under the implied duty of fair representation crafted by this Court, and raises important issues of labor law and policy that warrant this Court's review.[5]

II. THE PREEMPTION DECISION IS INCONSISTENT WITH DECISIONS OF THIS COURT EXPRESSLY APPROVING ASSUMPTION OF CONTRACT DUTIES GREATER THAN THE DUTY OF FAIR REPRESENTATION.

2a. Respondent argues that the decision below does not conflict with this Court's preemption jurisprudence, citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-212 (1985) for the proposition that this Court has preempted state law on the basis of implied rights of action (Opp. Br. 18 n. 9). *Allis-Chalmers* did not concern the implied duty of

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[5] Respondent's argument that the lower court properly applied this Court's arbitrariness standard does not address the fact that the lower court found ALPA's conduct was not arbitrary solely because the result "follow[ed] the wishes of the majority" (App. 22a). Likewise, Respondent simply ignores the conflict between those circuits that require, in a bad faith claim, a showing that the union intended to violate a promise when made, and those that hold that a breach of promise is actionable without regard to intent (Pet. 18-19 n. 7).

fair representation at issue here, nor did it concern any *implied* federal right. Instead, that case dealt with preemption of state law by section 301 of the Labor Management Relations Act ("LMRA"), which explicitly provides that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court in the United States. . . ." 29 U.S.C. § 185. This Court's very recent unanimous decision in *Hawaiian Airlines, Inc. v. Norris*, 62 U.S.L.W. 4537, 4539 (June 20, 1994), a case dealing with preemption under the Railway Labor Act ("RLA") as this case does, reiterates the Court's consistent view that congressional intent is the touchstone for preemption analysis: "[w]hether federal law pre-empts a state law establishing a cause of action is a question of congressional intent." Respondents have failed to cite a single decision of this Court holding that the required congressional intent to preempt state law can ever be found for a duty that is implied by the courts.[6] The decision below that the implied duty of fair representation preempted state law contract claims thus conflicts with this Court's consistent interpretation of the Supremacy Clause to require as a prerequisite to preemption clear expression of congressional intent to supplant state law.[7]

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[6] Notwithstanding Respondent's assertion that "[w]hen Congress granted unions the exclusive authority to represent railroad and airline employees . . . it imposed a corresponding 'statutory duty' to represent employees fairly" (Op. Br. 15), Congress imposed no express duty. Instead, this Court implied a duty of fair representation from Congress' grant of exclusive representational authority to unions, in a manner similar to that in which the Court has implied causes of action from other statutes that create no express claim. *E.g.*, *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

[7] Respondent cites several lower court decisions which it claims have preempted state law claims on the basis of the duty of fair representation (Opp. Br. at 17-18). All are distinguishable. They involve preemption on the basis of section 301 of the LMRA, *In Re Glass Workers, Local No. 173*, 983 F.2d 725, 728-29 (6th Cir. 1993); preemption because they depend on the interpretation of a collective bargaining agreement, *Peterson v. ALPA*, 759 F.2d 1161 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); preemption of tort, not contract claims where the duty alleged is based solely on the union's status as collective bargaining agent,

2b. Respondent argues nevertheless that state contract law must be preempted by the duty of fair representation because unions would otherwise be faced with conflicting obligations to their members. This contention is simply not true. This Court has twice held that unions may by contract assume obligations to their members greater than those imposed by the duty of fair representation. *United Steelworkers of America, AFL-CIO v. Rawson*, 495 U.S. 362 (1990); *I.B.E.W. v. Hechler*, 481 U.S. 851, 860 (1987). An advance agreement as to how competing interests in the union will be resolved in future circumstances is not a *per se* violation of the duty of fair representation, as Respondent's argument would suggest. Nor would the union's compliance with such an advance agreement force it to violate its duty of fair representation to a particular group in the union that is disadvantaged by the agreement. Quite the contrary: the union would honor its duty *both* to the minority *and* to the majority by vigorously enforcing a policy to which both camps had agreed, and on which the minority had detrimentally relied.

2c. Respondent attempts unsuccessfully to distinguish *Rawson* and *Hechler* on the ground that they have no bearing on preemption of state contract law because they involved claims that the duty of fair representation preempted a federal breach of contract action provided by

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Richardson v. United Steelworkers of Am., 864 F.2d 1162 (5th Cir.), *cert. denied*, 493 U.S. 803 (1989); *Johnson v. United Food & Commercial Workers*, 828 F.2d 961 (3d Cir. 1987); and claims against non-union parties, *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985). Indeed, *Richardson*, which discussed preemption in the context of deciding an issue of Federal court removal jurisdiction, specifically noted that it was not addressing a situation where the union had assumed an obligation directly to its members, as ALPA did in this case. 864 F.2d at 1167.

To the extent some of these cases may be read to have preempted state law claims based solely on the implied duty of fair representation, they are, like the decision below, in conflict with this Court's preemption jurisprudence. The fact that a number of the lower courts may have gone astray in this area emphasizes the need for this Court to grant the petition and require adherence to its prior decisions.

section 301 of the LMRA, not a state contract claim. The RLA provides no federal contract claim similar to section 301. All contract claims against RLA unions must, therefore, arise under state law. Respondent cites no authority that Congress intended RLA unions to be uniquely relieved from their contract obligations or, unlike LMRA unions, disabled from assuming contract obligations greater than those implied by the duty of fair representation.

This Court has, moreover, recently rejected the distinction drawn by Respondent between RLA unions and LMRA unions for preemption purposes. In *Hawaiian Airlines, Inc. v. Norris*, the Court held that principles derived from cases involving a conflict between the LMRA and another federal statute were equally applicable to a case involving "RLA preemption of a cause of action arising out of *state* law." 62 U.S.L.W. at 4541 n. 6. That is because "[p]rinciples of federalism demand no less caution in finding that a federal statute pre-empts state law." *Id.* Under the reasoning of *Hawaiian Airlines*, just as the duty of fair representation does not immunize a union from suit for breach of contract under section 301 of the LMRA, as *Rawson* and *Hechler* hold, it likewise provides no immunity to unions from suits for breach of contract under state law.

Hawaiian Airlines' narrow view of preemption is instructive for another reason. The Court held that the *express* statutory remedies of the RLA for resolution of "minor disputes"—those relating to breach of a collective bargaining agreement—did not preempt a state law claim by a union member for wrongful discharge: "a state law cause of action is not pre-empted by the RLA if it involves rights and obligations independent of the collective bargaining agreement." 62 U.S.L.W. at 4541. Respondent's argument for a much broader preemption flowing from the *implied* duty of fair representation—without identifying any substantive provision of the RLA with which enforcement of state contract law would conflict—is thus inconsistent in fundamental principle with the Court's la-

bor preemption jurisprudence as recently articulated in *Hawaiian Airlines*.

2d. Respondent's contention that *Rawson* and *Hechler* do not apply where collective bargaining conduct is involved is unsupported by any decision of this Court. No case cited by Respondent has created a special zone of immunity from state contract law for conduct that touches on collective bargaining. Respondent makes no effort to distinguish those cases cited by Petitioner (Pet. 11-12) that have refused to exempt collective bargaining conduct from state law scrutiny. And *Rawson* and *Hechler* do not themselves suggest that unions can assume only some obligations beyond those imposed by the duty of fair representation, but not if they are related to collective bargaining. Indeed, this Court noted in *Rawson* that "[w]e have never held, however, that as a matter of federal law, a labor union is *prohibited* from voluntarily assuming additional duties to the employees by contract," and explicitly rejected the argument made by the union in that case that "only the duty of fair representation governs the exercise of its representational functions under the collective bargaining contract." *Rawson*, 110 S. Ct. at 1911. Accordingly, contrary to Respondent's similar argument here, the lower court preemption of state contract claims is in conflict with this Court's clear holding that unions are not exempt from their obligations to live up to their contracts.[8]

CONCLUSION

The petition for writ of certiorari should be granted.

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[8] Respondent's final argument that certiorari is improper on the preemption point because the district court held that there was no breach of contract is inconsistent with the lower court's conclusion that a "reasonable jury" could find that "ALPA engaged in a unified strategy to minimize and evade its obligations to the Eastern pilots" (App. 35a-36a).

Respectfully submitted,

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July 15, 1994